Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

vs.

SYLVESTER HARRIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Richard G. Harvey, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 20, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, which appears in the appendix hereto, App. 3, *infra,* is reported at 605 F.2d 330 (7th Cir. 1979). The opinion of the District Court on motions after verdict, which appears in the appendix hereto, App. 22, *infra,* is reported at 453 F.

Supp. 886 (E.D. Wis. 1978). The opinion of the District Court on motion for summary judgment, which appears in the appendix hereto, App. 35, *infra,* is reported at 436 F.Supp. 143 (E.D. Wis. 1977). The opinion of the District Court on motions to dismiss, which appears in the appendix hereto, App. 50, *infra,* is reported at 419 F. Supp. 30 (E.D. Wis. 1976).

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1979. A timely petition for rehearing *en banc* was denied on November 1, 1979, by a six-to-four vote, and this petition for certiorari was filed within 90 days of that date. By order dated November 5, 1979, the Court of Appeals modified the language of its August 20, 1979, opinion. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals in a 42 U.S.C. §1983 damage action approving instructions directing the jury to consider purely judicial acts of a state court judge to determine whether the judge's other acts were racially motivated and malicious, resulting in an award of $60,000.00 compensatory and $200,000.00 punitive damages, violates principles of judicial immunity.

2. Whether a state court judge may be held, as the lower court found as a matter of law, both to have acted without any semblance of jurisdiction so as to be stripped of judicial immunity, and at the same time to have acted under color of law and as an agent of the state within the meaning of 42 U.S.C. §1983 and the equal protection clause.

3. Whether this 42 U.S.C. §1983 action which alleged a violation of respondent's Fourteenth Amendment right to equal protection of the laws due to petitioner's racially-motivated actions was properly brought in federal court where the action sounds in defamation, and respondent's interests in liberty or property were not affected.

4. Whether in an action pursuant to 42 U.S.C. §1983, First Amendment privileges apply to a judge's out-of-court comments upon and criticism of the official conduct of respondent police lieutenant.

5. Whether question 2 of the Special Verdict which listed five separate categories of injury and allowed the jury to answer whether respondent was injured in any of those respects, was duplicitous and fatally defective.

STATUTORY PROVISION INVOLVED

Title 42 United States Code, §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. §§1343 and 1331, and 42 U.S.C. §1983.

Petitioner Harvey was the Judge of Racine County Court Branch III, a court of general civil and criminal jurisdiction. §§253.11, 253.12, Wis. Stats. He was first

appointed to the office in 1968, and was elected and re-elected in contested elections for six-year terms in April, 1969 and April, 1975. Branch III was primarily devoted to the handling of traffic and misdemeanor cases.

Respondent Harris was a lieutenant in the Racine Police Department and in charge of its Community Relations Department. Lieutenant Harris' official duties included making recommendations with respect to reducing or dismissing charges pending before Judge Harvey's Court. (Tr. 47, 48, 50, 51, 62, 98-100).

On January 11, 1974, one Dale Vorlob complained to the District Attorney that he had been ambushed, beaten and threatened by Lieutenant Harris on the preceding night. The District Attorney referred this matter to the Police Department for internal investigation. When no action was forthcoming, the District Attorney requested Judge Harvey to preside over a John Doe proceeding into the matter.[1] (Tr. 793-796, 802). In the meantime, Vorlob was given a lie detector test and the examiner found his answers to be truthful. The District Attorney's office requested that Harris take a polygraph, but he refused. (Tr. 190, 598, 974-977).

A John Doe proceeding was presided over by Judge Harvey on January 30 and 31, 1974. Lieutenant Harris was subpoenaed, but did not appear on advice of counsel. (Tr. 594-596). At the conclusion of the hearing, a criminal complaint was filed charging Lieutenant Harris with

[1] John Doe proceedings are authorized by §968.26, Wis. Stats. These proceedings are conducted by a judge of a court of record who exercises a judicial function. *State v. Washington*, 83 Wis. 2d 808, 823, 266 N.W.2d 597 (1978). "The John Doe judge should act with a view toward issuing a complaint or determining no crime has occurred." *Id.*, 83 Wis.2d at 823-824. The judge has a broad discretion as to the scope and extent of the proceedings. *Id.*

one felony and two misdemeanors. (Tr. 1043-1044). The felony count was dismissed in April, 1974, on the ground that Vorlob was not a credible witness. The misdemeanors were dismissed in February, 1975, on the ground that Judge Harvey had not acted as an impartial magistrate during the John Doe. (Tr. 142-143, 146-147, 804-805, 986-988).

The immediate results of the issuance of the complaint were extensive publicity, including charges that the John Doe hearing and resultant criminal charges were racially inspired and motivated, and a mass meeting in support of Lieutenant Harris. Related legal proceedings, including habeas corpus, a removal petition, and a judicial commission proceeding against Judge Harvey, lasted for several years, all involving considerable publicity.

Both Judge Harvey and Lieutenant Harris were controversial figures. Lieutenant Harris was frequently described as controversial, outspoken, and tactless. (Tr. 60, 78, 79, 410-413). There appears to have been a mutual dislike between these two officials, as a result of conflicts involving their respective official duties. (Tr. 61, 62, 101-102, 110-111, 118-119). Judge Harvey, a white, was accused of privately using racially derogatory terms about Lieutenant Harris, a black. (Tr. 49-51, 96, 101-102, 104). Judge Harvey denied these charges. (Tr. 286-288). These accusations were the only evidence, with the possible exception of the John Doe proceedings, that tended to show Judge Harvey's racial animus against Harris. Lieutenant Harris was accused of publicly using racially derogatory terms about the Judge, as well as publicly calling him a queer. (Tr. 84, 118-119, 124-126, 285-286).

In August, 1974, the results of an independent investigation unrelated to the Vorlob affair were made public

in the media. Commencing in 1973, Judge Harvey had become concerned about the manner in which traffic charges were being dismissed or reduced in his Court by two white police officers and Lieutenant Harris and had complained to the Chief of Police. (Tr. 66, 67, 255, 256, 1085-1089). Judge Harvey instituted a system for control of dismissal or reduction of charges in his court to require documentation of reasons as well as signatures of the appropriate police officer or prosecutor. However, some dismissals still "slipped by" when substitute judges were presiding in Judge Harvey's Court. (Tr. 296, 297, 1086, 1087). Although Judge Harvey had the ultimate responsibility for approving dismissals, he had to rely upon the trustworthiness of the police officers because of the large caseload of his court.[2] (Tr. 1171). Finally, in August, 1974, a local newspaper reported the contents of a letter from Judge Harvey to Police Chief Donald Dodge, which outlined two instances of alleged police misconduct involving two white officers and Lieutenant Harris. Further public and private correspondence regarding police corruption and ticket fixing continued for several months. (Tr. 255-266). During this time, Judge Harvey learned that Lieutenant Harris had a role in the dismissal of at least 15 traffic tickets in Judge Harvey's court involving members of Harris' family. This was called to the attention of the Chief of Police, but was not made public (Tr. 272-279, 1089-1094; Exh. 22, 24, 25). The bad feeling between Judge Harvey and Harris increased as a result of the traffic ticket situation. (Tr. 76, 77, 101, 102, 110, 111, 391-393).

In November, 1977, a new Chief of Police gave Harris a five day suspension for refusing to obey a lawful order. Following this suspension, Harris resigned. No claim is

[2] In 1974, Judge Harvey's Court handled 16,000 cases, 60% traffic and 40% misdemeanor. (Tr. 1101).

asserted that Judge Harvey had anything to do with either the suspension or the resignation. (Tr. 714-723, 740, 939-947, 951-952).

Harris commenced this action pursuant to §1983 against Judge Harvey and District Attorney Gerald Clickner on October 26, 1975, seeking money damages and equitable relief arising out of Judge Harvey's private and public statements concerning the Vorlob John Doe and the alleged ticket fixing. The District Attorney was dismissed from the action on August 5, 1976, on the ground that no violation of a federally protected right had been charged against him. On June 30, 1977, the District Court granted partial summary judgment to Judge Harvey dismissing the claim for injunctive relief and the due process claim. The District Court dismissed the due process claim on the ground that under *Paul v. Davis,* 424 U.S. 693 (1976), Harris' claim that his job had become "unsatisfying" and "totally unbearable" did not sufficiently show a deprivation of a liberty interest. The Court, however, refused to dismiss the equal-protection claim on the ground that *Paul v. Davis* presented no equal-protection issue.

This matter was tried to a jury commencing on February 27, 1978. The District Court found as a matter of law that Judge Harvey acted under color of law in that he wrote letters on official stationery and disseminated press releases identifying himself as a county judge. (App. 25, 26).[3] The District Court also held, as a matter of law, that

[3] The press release was prepared by the District Attorney's office following the filing of the complaint against Harris arising out of the Vorlob incident. Judge Harvey was given a copy of the release and was asked to use it if requested for information. When contacted by a local radio station, Judge Harvey read a portion of the press release for recording, which portion identified only the charges and statute numbers involved. Judge Harvey was also asked whether Harris had been asked to testify and had refused, and Harvey answered "yes". (Tr. 135-138, 308, 317, 799-801, 984, 1042-1043, 1046-1048; Exh. 2).

these acts were not judicial acts and were undertaken in the absence of all jurisdiction. (App. 27).

Over petitioner's objection, the District Court instructed the jury that it could consider evidence of events occurring while Judge Harvey was conducting his duties as a judge for purposes of determining his state of mind or motive for his other actions. (Tr. 1314). The jury found that Judge Harvey had acted with racial motivation. With respect to Harris' injuries, petitioner does not know what the jury found since five questions were presented to the jury in the alternative, and the jury answered "yes". The jury awarded $60,000.00 in compensatory damages, and also found that petitioner's acts were malicious and awarded $200,000.00 in punitive damages. (Tr. 1342-1343).

The District Court denied motions after verdict in a decision dated June 26, 1978. The Court of Appeals in a decision dated August 20, 1979, affirmed in all respects.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals approved instructions permitting the jury to consider the judicial acts of Judge Harvey in order to determine his state of mind or motive for taking other actions with respect to respondent. Petitioner believes that this holding is in direct conflict with this Court's recent decision in *United States v. Helstoski,* — U.S. —; 99 S. Ct. 2432 (1979), and conflicts, in principle, with *Bradley v. Fisher,* 80 U.S. 335 (1872), and kindred decisions of this Court. Further, the holdings below that, as a matter of law, Judge Harvey acted both in a non-judicial capacity in the absence of all jurisdiction and at

the same time acted under color of state law, conflicts in principle with *Bradley v. Fisher* and numerous decisions of this Court commencing with the *Civil Rights Cases,* 109 U.S. 3 (1883).

It is undisputed that Judge Harvey enjoyed judicial immunity in conducting the John Doe proceedings and issuing the criminal complaint. The District Court's instruction specifically permitted the jury to consider evidence of events occurring "while Judge Harvey was conducting his duties as a Judge" for purposes of determining his "state of mind or motive for taking the other actions against the defendant, which are the subject of this lawsuit." (Tr. 1314). The Court of Appeals approved this instruction with an off-hand citation to Rule 404(b), Federal Rules of Evidence. (App. 12).

There is no rationale for applying Federal Rule of Evidence 404(b), which is based upon the policy that "a man ought not be convicted of doing a specific bad act because he is a bad fellow generally,"[4] to the doctrine of judicial immunity which is based upon "a general principle of the highest importance to the proper administration of justice,"[5] and which is designed "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their function with independence and without fear of the consequences."[6]

Although this Court has not specifically considered this state of mind issue in the context of judicial immunity, it has recently rejected the holding of the Court

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[4] *United States v. Fierson,* 419 F.2d 1020, 1022 (7th Cir., 1969).

[5] *Bradley v. Fisher,* 80 U.S. at 347.

[6] *Pierson v. Ray,* 386 U.S. at 554 (quoting prior decision).

of Appeals in the analogous context of the Speech or Debate Clause. *United States v. Helstoski,* 99 S. Ct. at 2439, 2440.

This Court, in *Pierson v. Ray,* 386 U.S. 547, 554, 555 (1967), relied upon a legislative immunity decision, *Tenney v. Brandhove,* 341 U.S. 367 (1951), in holding that judicial immunity survived the enactment of §1983. This Court has frequently recognized the common antecedents, purposes, and scope of judicial, legislative, and Speech or Debate Clause immunities. See, e.g., *Barr v. Matteo,* 360 U.S. 564, 569-572 (1959). The Court of Appeals ignored the holding in *United States v. Helstoski* that the immunity cannot be breached by permitting the jury to consider immune acts to show state of mind or motive for other acts.

The holding below, permitting judicial inquiry into the judicial acts and state of mind of a sitting judge, conflicts with principles of judicial immunity frequently emphasized by this Court. For example, *Bradley v. Fisher, supra,* states:

> Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. 80 U.S. at 347.

This ban against consideration of a judge's state of mind has been frequently expressed. See, *Yaselli v. Goff,* 12 F.2d 396 (2nd Cir. 1926), *affirmed* 275 U.S. 503 (1927); *United States v. Morgan,* 313 U.S. 409, 422 (1941). This ban is necessary to prevent what happened here: Permitting the second judge or jury to second-guess the propriety of or motivation for what the first judge did.

The Court of Appeals endorsed the District Court's holding that, as a matter of law, Judge Harvey acted in

the absence of all jurisdiction and was not performing judicial functions but that at the same time he acted under color of state law. (App. 10, 12). The Court of Appeals specifically held that the out-of-court acts of Judge Harvey "were undertaken in the 'absence of all jurisdiction,'" were not "judicial" acts, and were not part of his duties.[7] (App. 10-12).

The Court of Appeals and District Court based their holding that Judge Harvey acted under color of state law upon the "misuse of power" or "pretense of law" theories first enunciated in *United States v. Classic,* 313 U.S. 299, 326 (1941). However, the lower courts failed to observe that this line of authorities is based upon an officer's performance of *official duties* — the misuse of a power *authorized* by the State.

Thus, in *Screws v. United States,* 325 U.S. 91, 110 (1945), this Court was careful to point out that with respect to the election officials in *Classic* and the police officers in *Screws:* "In each officers of the State were performing official duties; in each the power which they were authorized to exercise was misused." The issue in *Williams v. United States,* 341 U.S. 97, 98 (1951), was "whether a special police officer who in his official capacity" coerces a confession is subject to prosecution under 18 U.S.C. §242. When this Court applied the *Classic* definition to §1983 actions, it was careful to state that in each of the §242 cases, the acts complained of were committed by officers in the performance of their duties. *Monroe v. Pape,* 365 U.S. 167, 172, 183, 184 (1961).

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[7] It is interesting to note that the Court of Appeals also upheld the $200,000.00 punitive damages award by adopting the District Court's holding that Judge Harvey engaged in "'a serious abuse of judicial power'" (App. 19).

Whatever the situation with respect to election officials or police officers who, in the performance of official duties, overstep their authority, the application of these principles to a judge, who, in the language of the Court of Appeals, is not performing his official duties, is not performing a judicial function, and has acted in the clear absence of all jurisdiction, is clearly erroneous. If Judge Harvey was acting in the performance of his duties as a judge, albeit unlawfully, and thus under color of law, he was immune. If, as the Court of Appeals held, he was not performing judicial duties, he was not acting under color of law.

This is clear from the language in the state action and judicial immunity cases. *Screws v. United States,* 325 U.S. at 111, states:

> We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. *They acted without authority only in the sense that they used excessive force in making the arrest effective.* It is clear that under 'color' of law means under 'pretense' of law. Thus, acts of officers in the ambit of their personal pursuits are plainly excluded. *Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.* (Emphasis added).

The emphasized language is reminiscent of the distinction between acts done in "excess of jurisdiction" and those done in the "clear absence of all jurisdiction." *Bradley v. Fisher,* 80 U.S. at 351. This Court recently reaffirmed the rule that a judge does not lose immunity for malicious acts done "in excess of his authority." *Stump v. Sparkman,* 435 U.S. 349, 356 (1978).

Even if Judge Harvey had acted under color of law for purposes of §1983, even though performing non-judicial acts beyond any pale of jurisdiction, how could he have acted for the state so as to come within the prohibitions of the equal protection clause, whose central purpose is the prevention of *official conduct* which is racially discriminatory?[8]

Individuals who "slander the good name of a fellow citizen" are "amenable to the laws of the State where the wrongful acts are committed," rather than to the prohibitions of the Fourteenth Amendment *Civil Rights Cases,* 109 U.S. 3, 17 (1883).

II.

This Court should grant the petition to settle important questions involving the scope of judicial immunity and of §1983 which affect the vital interests of the public and of every judge in this nation.

The decision below permits a jury to inquire into the judicial acts and state of mind of a sitting judge. In this case, the instruction inevitably led both to a finding of "racial motivation" and, thus, liability under §1983 and the imposition of $60,000.00 in compensatory damages, and to a finding of malice and, thus, imposition of $200,000.00 in punitive damages.[9] It would be naive to assume that this significant gap in the immunity doctrine

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[8] *Washington v. Davis,* 426 U.S. 229, 239 (1976).

[9] The Court of Appeals was obviously troubled by the punitive damage award and *sua sponte* suggested that the trial judge consider lowering the amount.

will not be exploited in present or future damage suits against heretofore immune officials.[10]

In *Stump v. Sparkman, supra,* Justice Stewart noted in dissent:

> The only question before us in this case is the scope of judicial immunity. How the absence of a "judicial act" might affect the issue of whether Judge Stump was acting "under color of" state law within the meaning of 42 U.S.C. §1983 [42 U.S.C.S. §1983], or the issue of whether his act was that of the State within the meaning of the Fourteenth Amendment that need not, therefore be pursued here. 435 U.S. at 369 n. 6.

The Court of Appeals not only answered that subtle question but held that the answer was so clear so as to justify the District Court's refusal to submit the immunity or color of law questions to the jury.

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[10] Damage suits against judges are becoming an increasingly significant problem in Wisconsin and nationally. See Brief Amicus Curiae of the Voluntary Association of the Trial Judges of Wisconsin. In addition, there has been an epidemic of lawsuits against judges and other state officials sponsored by extremist political groups brought for the sole purpose of harrassment. See The National Law Journal, Nov. 19, 1979, at p. 1, col. 1.

The potentially devastating effect of such an abrogation of the immunity doctrine is well-illustrated by the jury summation in this case. By frequent reference to the way Judge Harvey conducted the John Doe proceeding and his issuance of the criminal complaints against Lieutenant Harris, respondent's counsel exhorted the jury to "set the standards" for the conduct of Wisconsin judges in general and Harvey in particular and to punish Harvey for failure to abide by these standards. (Tr. 1167, 1235-1236). Referring to the punitive damages question, counsel argued: "Folks, you are the ones who are going to set the standards in the State of Wisconsin . . . for the way judges can treat human beings" and "I am going to ask you to put in the figure of one million dollars ($1,000,000.00) to let the judges of this state know that you don't engage in the type of conduct that Richard Harvey engaged in against Sylvester Harris." (Tr. 1235-1236).

The Court of Appeals distinguished the case at bar from *Paul v Davis, supra,* on the basis that "[t]hat case presented no equal protection issue." (App. 13). Yet, lower courts have consistently held that the right to be free from defamatory or raciâlly derogatory statements is not a federally protected right, including a right protected by the equal protection clause.[11]

Moreover, the public policy arguments noted by this Court in *Paul* apply with equal force to defamation-like actions brought under the equal protection clause. *Paul, supra,* at 698. In enacting 42 U.S.C. §1983, Congress did not extend:

> . . . a right to be free of injury wherever the State may be characterized as a tortfeasor . . . [S]uch a reading would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. *Paul, supra* at 701.

See also *Ingraham v. Wright,* 430 U.S. 651, 701, 702 (1977) (Stevens, J. dissenting), citing *Bonner v. Coughlin,* 517 F.2d 1311, 1318-1320 (7th Cir. 1975), *modified en banc,* 545 F.2d 565 (1976), *cert. denied* 435 U.S. 932 (1978).

The Court of Appeals also held that Judge Harvey was not entitled to any First Amendment privilege for his out-of-court comments upon and criticism of the official conduct of respondent police lieutenant, with the observation that "plaintiff's claim was not for defamation but for an intentional deprivation of equal protection of the laws." (App. 14). Whether labelling a defamation

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[11] See *El-Em Band of Pomo Indians v. 49th Dist. Agricultural Fair Assoc.,* 359 F.Supp. 1044 (N.D. Cal. 1973); *Johnson v. Hackett,* 284 F.Supp. 933 (E.D. Penn. 1968); *Smith v. Klecker,* 554 F.2d 848 (8th Cir. 1977).

claim as a §1983 action abrogates well-established First Amendment protections has not been clearly decided by this Court.[12]

Both Judge Harvey and Lieutenant Harris were public officials and Harvey's statement related to matters of great public concern: Court administration and alleged police misconduct. Judge Harvey was facing a contest for re-election in 1975. There was no evidence that Harvey's statements were false, much less made with actual malice. See, *New York Times Co. v. Sullivan,* 376 U.S. 254, 279, 280 (1964).

Moreover, the decision below conflicts in principle with *Smith v. Klecker, supra.* Although the Eighth Circuit relied primarily on *Paul v. Davis, supra,* in affirming the judgment of the trial court which dismissed the complaint, the Court also noted that the defendants would be immune from liability under *New York Times, supra.*

Finally, question 2 of the Special Verdict, in which the jury was asked whether respondent was injured in *any* of five enumerated respects, was fatally duplicitous, thus requiring a new trial.[13] Where a Special Verdict contains several questions disjunctively put, and the jury answers "yes", it is impossible to determine what the jury

[12] This court has stated that §1983 must be read against the background of tort liability (*Monroe v. Pape,* 365 U.S. at 187), including common law defenses to conduct charged, *Pierson v. Ray,* 386 U.S. at 556, 557; and that §1983 must be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman,* 424 U.S. 409, 418 (1976).

[13] In an Order dated November 5, 1979, the Court of Appeals substantially modified that portion of its decision dealing with the form of the Special Verdict.

has found. See *Vlasak v. Gifford,* 248 Wis. 328, 333, 334, 21 N.W. 2d 648 (1946); *Skidmore v. Baltimore & Ohio R. Co.,* 167 F.2d 54, 66 (2nd Cir. 1948), *cert. denied* 335 U.S. 816 (1948).

CONCLUSION

The decision of the Court of Appeals has created uncertainty in an area of the law thought to have been resolved by the clear reaffirmation of century-old principles by this Court in *Stump v. Sparkman.* Unless these important questions are settled by this Court, all conscientious judges will labor under this uncertainty to the ultimate detriment of the public in whose interest the doctrine of judicial immuntiy has evolved.

Respectfully submitted,

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January 29, 1980

APPENDIX

Opinion by Judge Cummings

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 20, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

SYLVESTER HARRIS,
Plaintiff-Appellee,

No. 78-2057 vs.

RICHARD G. HARVEY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 75-C-612
Myron L. Gordon, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it was ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

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* Honorable William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-2057

SYLVESTER HARRIS,

Plaintiff-Appellee,

v.

RICHARD G. HARVEY, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 75-C-612—**Myron G. Gordon**, *Judge.*

ARGUED JUNE 7, 1979—DECIDED AUGUST 20, 1979

Before FAIRCHILD, *Chief Judge*, CUMMINGS, *Circuit Judge*, and CAMPBELL, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* This action was brought under the Civil Rights Act (42 U.S.C. § 1983) by a former Racine, Wisconsin, police lieutenant against a Racine County, Wisconsin, judge[1] and against Gerald Clickner, Racine County District Attorney. Plaintiff claimed that defendants' actions deprived him of

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* Honorable William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

[1] Defendant Harvey was then a Racine County judge but became a Circuit Judge of Racine County through a 1977 change in Wisconsin's judicial system.

Fourteenth Amendment due process and equal protection of the laws. We are setting out the allegations of the complaint in some detail (and in the same order as the pleader) because the jury found the key allegations sufficiently proved.[2]

Plaintiff alleged that on January 8, 1974, Dale Vorlob, a paroled felon, was charged with felonious battery for attacking plaintiff with a pistol. On January 11, 1974, Vorlob told District Attorney Clickner that on January 10 plaintiff pistol-whipped Vorlob and threatened him with bodily harm if Vorlob testified against Harris at Vorlob's battery trial. Vorlob was convicted in a jury trial on March 27, 1974.

According to the complaint, Clickner communicated Vorlob's statements to Judge Harvey who urged Clickner to have a complaint sworn out against plaintiff, and on January 13, Clickner contacted the Racine Chief of Police to obtain help in the investigation of Vorlob's charges against plaintiff. However, after an internal investigation the Racine Police Department found Vorlob's charges baseless and therefore initiated no disciplinary proceeding against plaintiff. Nevertheless, on January 23, Clickner, "acting in his official capacity under color of law," maliciously authorized a petition to Judge Harvey for a secret John Doe investigation of the plaintiff pursuant to Wisconsin law. See Wis. Stat. § 968.26.[3]

Plaintiff alleged that prior to January 9, 1974, Judge Harvey had told Racine Assistant Chief of Police Hagopian that he was going to get that "black bastard," the plaintiff. On numerous occasions prior to January 21,

[2] For sake of brevity we will not summarize the copious evidence as to defendant's racial motivation. Since it was overwhelming, defendant does not even contend otherwise in his reply brief and only includes the point in the last section of his principal brief concerning the trial court's supposedly erroneous evidentiary rulings. Insufficiency of the evidence was not argued orally.

[3] A John Doe hearing is a procedure authorized by Wisconsin law in which a judge hears testimony on whether a crime has been committed. If he finds there is probable cause to charge the accused, he issues an arrest warrant.

Judge Harvey "under color of law and beyond his jurisdiction" maliciously stated to many people that the plaintiff received preferential treatment and favors from the Racine Police Department because he was black.

On or before January 9, Judge Harvey supposedly "maliciously made racial remarks which were intended to reflect upon associates, friends and attorneys of Harris in an effort to have them disassociate themselves from Plaintiff Harris."

Commencing at 7:30 p.m. on January 29, Judge Harvey presided over the John Doe proceeding where assistant district attorneys authorized by Clickner "under color of law maliciously presented secret testimony against Plaintiff Harris." Plaintiff charged that during that proceeding, Judge Harvey "acted within his jurisdiction as county judge under color of law," maliciously threatening witnesses with prosecution and perjury because they would not incriminate plaintiff.

On January 30, Judge Harvey allegedly informed a newspaper reporter that he was conducting a John Doe hearing at which the plaintiff Vorlob swore that Harris beat and threatened him, and Harvey added that plaintiff would be charged with criminal violations.

On January 31, Vorlob signed three secret complaints against plaintiff, and Judge Harvey, "acting in his official capacity as judge under color of law," maliciously and without probable cause issued an arrest warrant for plaintiff for allegedly violating Wisconsin Statutes §§ 940.20 [misdemeanor: battery], 941.20 [misdemeanor: aiming and pointing firearm] and 943.30 [felony: threatening a witness]. On the same date Judge Harvey read the warrants for the arrest of plaintiff over a radio station as well as a press release prepared by defendant Clickner, and maliciously informed the press that plaintiff refused to testify at the John Doe proceeding involving Vorlob's charges against Harris.

The complaint also charges that on February 4, Judge Harvey maliciously stated at plaintiff's initial court

appearance that the other Racine County judges wished to be disqualified from trying plaintiff. On the same date defendant Harvey called for the dismissal of plaintiff from his police department job and attempted to have the Chief of Police suspend or fire him. On the next day Judge Harvey allegedly maliciously stated that plaintiff should be forced to take a lie detector test or be fired on the untrue ground that Vorlob had passed such a test.

Before plaintiff's trial on any of the criminal complaints, commencing on February 4, Judge Harvey in public and in the public media commented on the merits of the Vorlob-related criminal charges against plaintiff and publicly called him "a fixer, a briber, and a sycophant."

Supposedly Judge Harvey on March 11 maliciously submitted an affidavit in a legal proceeding making racial and derogatory remarks about plaintiff.[4] Both defendants allegedly met with officials of the Wisconsin Attorney General's office and threatened to accuse plaintiff of bribery, ticket-fixing, and other illegal activities in the public press unless the Attorney General would "do something about Harvey."

On February 4, plaintiff was suspended with pay by the Racine Police Department "after being pressured by Harvey," and on February 5 Judge Harvey maliciously accused the Chief of Police of engaging in the cover-up because plaintiff "was not ordered to take a lie detector test and because he was not suspended without pay."

On April 8, Judge Harvey publicly accused plaintiff of being on a paid vacation and termed his defense of the criminal charges against him to be "nonsense." On August 8, Judge Harvey maliciously accused plaintiff of unlawful conduct and publicly wrote that plaintiff was engaging in criminal conduct.

On August 15, Judge Harvey wrote the City Attorney that the police department should take disciplinary ac-

[4] Summary judgment was subsequently granted to defendant Harvey with respect to this charge contained in paragraph 30 of the complaint. See 436 F.Supp. at 151.

tion against plaintiff or else Judge Harvey would commence criminal proceedings against him. On September 6, Judge Harvey wrote the City Attorney and accused him of whitewashing plaintiff's "documented" violation of Wisconsin Statute § 946.12(1) [misconduct in office]. On November 22, Vorlob told plaintiff and various Racine officials that he did not know who beat him on January 10 and had so told defendant Clickner.

On February 11, 1975, the two misdemeanor complaints against Harris were dismissed by another judge "because of the manner in which Harvey conducted the John Doe."[5]

On February 12, 1975, Judge Harvey wrote a derogatory letter to the judge who had dismissed the misdemeanor charges against the plaintiff and caused the letter to be read by the other Racine County judges.

On February 2, 1974 [*sic* 1975], defendants commenced another secret John Doe [ticket-fixing] investigation of plaintiff and others, and Judge Harvey on numerous occasions made racial remarks about plaintiff to get him off the police force and arranged for the search of records of the police department and the court system in order to make a list of all cases against anyone named Harris in the past ten years.

On July 8, 1975, Judge Harvey wrote a letter to the Chief of Police accusing plaintiff of destroying police records and stating "that the Harris family appears to be immune from prosecution" and further indicating that he would release the information to the Racine *Journal-Times.*

As a result of the foregoing actions plaintiff alleged he was deprived of due process and equal protection of law under the Fourteenth Amendment. He sought injunctive relief, $250,000 in compensatory damages, $1,000,000 in punitive damages, and attorneys' fees.

On August 5, 1976, Judge Gordon dismissed the action against the District Attorney of Racine County because

[5] The felony charge had been dismissed on May 31, 1974, by still another judge for lack of probable cause.

no violation of a federally protected or constitutional right was charged against him.[6] At the same time Judge Gordon denied Judge Harvey's motion for dismissal because a violation of Harris' Fourteenth Amendment right to equal protection of the laws was adequately alleged with respect to Judge Harvey and because his acts were allegedly racially motivated and committed outside of his jurisdiction. He also held that the complaint did properly allege that the offending acts were performed under color of state law. 419 F.Supp. 30. On June 30, 1977, Judge Gordon granted summary judgment for defendant as to the plaintiff's claim for an injunction on the grounds that the prospect of future criminal proceedings against Harris was too remote to present a case or controversy and that plaintiff had an adequate remedy at law. Holding that under *Paul v. Davis, supra*, plaintiff's claim that his job had become "unsatisfying" and "totally unbearable" did not sufficiently show a deprivation of a liberty interest, Judge Gordon dismissed the plaintiff's due process claim. However, the court denied defendant summary judgment with respect to plaintiff's equal protection claim because plaintiff's allegations that his loss of credit, injury to reputation, and deprivation of opportunities for advancement were inflicted through racially discriminatory treatment were sufficient to state an equal protection claim and the question of motivation was one for the jury. Finally, the district court granted summary judgment to Judge Harvey as to the allegation in paragraph 30 of the Complaint that on March 11 he had maliciously executed an affidavit in a legal proceeding and in the affidavit made racial and derogatory remarks about plaintiff. The reason for holding paragraph 30 to be insufficient was because "the legal proceeding in which the affidavit was submitted was intimately related to matters within the jurisdiction of the defendant's court." 436 F.Supp. 143, 151.[7] The only claim remaining for the jury was whether the defendant had through non-judicial acts motivated by racial animosity inflicted injury—including loss of employment opportunity, injury to reputation and emotional distress—on the plaintiff.

[6] Apparently it was not alleged that Clickner acted out of racial animus. Therefore only the due process claim remained against him and the district court held that under *Paul v. Davis*, 424 U.S. 693, the allegations of the complaint did not amount to a deprivation of due process.

The jury trial commenced on February 27, 1978. During the trial Judge Gordon ruled as a matter of law that defendant acted under color of law and in the absence of all jurisdiction (App. 18). On March 8 the jury returned a special verdict that Judge Harvey's actions concerning the plaintiff were racially motivated, that plaintiff was injured by such racially motivated acts with respect to his reputation in the community, reputation and working ability within the police department, and opportunities for advancement within that department. The jury also found that Judge Harvey's racially motivated acts had caused the plaintiff humiliation, embarrassment and mental distress and interfered with his continued employment. The jury set compensatory damages at $60,000. It also found that Judge Harvey's actions were done maliciously, wantonly or oppressively and therefore assessed $200,000 punitive damages against him. In a lengthy and persuasive opinion the district judge refused to disturb the verdict (App. 26-38) and later awarded plaintiff attorneys' fees in the amount of $7,500 (App. 39) in lieu of the $39,120 claimed (App. 38). We affirm.

[7] The judge also noted that only equitable relief was sought on the basis of allegations that defendant conducted judicial proceedings maliciously and unfairly. Although the doctrine of judicial immunity does not bar injunctive relief, summary judgment had already been granted for the defendant on the equitable claims. Plaintiff's only claim to damages relating to the conduct of judicial proceedings was based on the affidavit executed by Judge Harvey. With the grant of summary judgment for the defendant on that issue, no claim involving judicial proceedings remained to be considered by the jury.

Neither Judicial Nor Prosecutorial Immunity Protects the Acts for Which Defendant Was Held Liable.

In support of reversal, defendant's principal argument is that he is immune from any liability to plaintiff for damages arising from his acts on the ground that he enjoyed judicial and prosecutorial immunity. As to the former, the trial judge properly applied the rule of *Stump v. Sparkman*, 435 U.S. 349, in holding that the acts perpetrated outside of Judge Harvey's courtroom and not then a part of his judicial functions were undertaken in the "absence of all jurisdiction." These acts involved the defendant's repeated communications to the press and to city officials over the course of more than a year. These communications were critical of plaintiff and called for action to be taken against him. Many of them were made while plaintiff was awaiting trial on the criminal charges stemming from the John Doe proceeding. Such acts were not judicial because they were not functions normally performed by a judge, and were not "to the expectations of the parties" in that as to these acts the parties did not deal with him in his judicial capacity. 435 U.S. at 362. Accordingly, the trial judge instructed the jury that although damages could not be assessed against Judge Harvey for conducting the John Doe proceedings, he could be held liable for his extra-judicial acts. Since no liability was imposed where Judge Harvey enjoyed judicial immunity, no error was committed on that score.

As to prosecutorial immunity, defendant relies on *Imbler v. Pachtman*, 424 U.S. 409. Since that case only immunizes a prosecutor when he is "initiating a prosecution and * * * presenting the State's case" (424 U.S. at 431), it is of no avail to this defendant. His only prosecutorial function was in connection with his conduct of the John Doe proceedings and the jury had been instructed not to assess any damages against him on that account. Therefore, his prosecutorial immunity was properly observed.

Defense of Official Immunity Fails.

In the district court and here defendant also contended that he was absolutely immune for his comments as a government official under *Barr v. Matteo*, 360 U.S. 564. That case dealt with a federal official and presumably does not apply to state officials, even in a libel situation. Outside of judicial immunity, a state officer's immunity is qualified. *Scheuer v. Rhodes*, 416 U.S. 232. In any event defendant seeks to extend judicial immunity to his extrajudicial acts by contending that they were undertaken—as were the acts complained of in *Barr*—to explain and justify official proceedings. Defendant's actions were assertedly undertaken to preserve the integrity and independence of his court. All of the offending communications are claimed to have been either in defense of allegations by plaintiff's supporters that the John Doe proceedings were improperly handled or related to Judge Harvey's attempt properly to administer his court by stopping the fixing of traffic tickets. The only authority cited for this defense is *Skolnick v. Campbell*, 398 F.2d 23 (7th Cir. 1968). However *Skolnick* was not a Section 1983 case, and we held that the plaintiff had failed to state a cause of action under Illinois libel law. We also commented that on the theory that Judge Campbell's answer to public criticism was merely "an appropriate response for the protection of the reputation of the court, [he] *may* in any event have enjoyed absolute immunity from civil liability under *Barr v. Matteo.*" (398 F.2d 23, 25-26, emphasis supplied.) Clearly the *Skolnick* case is not precedent for extending judicial immunity to non-judicial acts. Even if it were, it would not protect this defendant because the public and private campaign of vilification alleged in the complaint and credited by the jury went well beyond an appropriate response to protect the integrity and reputation of the court. Moreover, the *Barr* rule has only applied to acts of high executive officers and with respect to actions in their line of duty. 360 U.S. at 573, 575. Since we agree with the district court that Judge Harvey's attacks on plaintiff were not part of his duties, *Barr* would not afford him a defense even if it did apply to judges. It is undisputed that defendant did not offer a

qualified immunity defense below, but in any event such a defense would not withstand the jury's malice finding. *Rosenblatt v. Baer*, 383 U.S. 75, 84.

John Doe Proceeding Evidence Was Admissible.

Next defendant contends that the trial judge erroneously received in evidence Judge Harvey's actions in the John Doe proceeding. However, Judge Gordon carefully instructed the jury that it could consider such evidence only insofar as it bore on defendant's state of mind or motive in his efforts to have the plaintiff removed from his job and to ruin his reputation because of racial prejudice (Tr. 1313-1314). The doctrine of judicial immunity does not require the exclusion of judicial acts from evidence but merely protects a judge from liability for those acts. Under Rule 404(b) of the Federal Rules of Evidence, the defendant's judicial acts were clearly admissible as proof of his racially discriminatory motive.

Defendant Was Acting Under Color of Law.

The district court instructed the jury that he had found as a matter of law that the defendant had acted under color of law (Tr. 1323). Defendant contends in his reply brief that if he acted as a private citizen the state action necessary for a Section 1983 claim is lacking, whereas if he acted in his judicial capacity he is immune from civil liability (Reply Br. 7). We have already discussed our agreement with the district court that immunity does not apply because Judge Harvey was not performing judicial functions. We also agree that nonetheless Judge Harvey was acting under color of law by using the power and prestige of his state office to damage the plaintiff.[8] As the district court said,

> "I was convinced at trial and remain convinced as a matter of law that the defendant acted under the pretense of his standing as a county judge. No reasonable juror, in my opinion, could find otherwise. Letters were written on official stationery. Press releases were disseminated by the defendant, identified as a county judge, through the media. The defendant brought to bear his influence as a county judge on those to whom he wrote and spoke. When the defendant Judge Harvey urged the discharge of Lieutenant Harris with racial overtones in out-of-court conversations with Captain Pavkovich [*sic*] and Assistant Chief Hagopian, he was acting as a functionary of the state * * *." (App. 30.)

[8] Defendant's counsel conceded at oral argument that a judge could act under color of law and yet in the absence of all jurisdiction. Counsel for the Voluntary Association of the Trial Judges of Wisconsin, appearing as *amicus curiae*, conceded that Judge Harvey was acting under color of law.

This Claim Is Cognizable under the Equal Protection Clause of the Fourteenth Amendment.

Defendant claims that this suit is for defamation and therefore is not cognizable under 42 U.S.C. § 1983, citing *Paul v. Davis*, 424 U.S. 693. However, *Paul* was basically a libel suit because a police department flyer had mistakenly included Davis' name and photograph in a list of shoplifters. That case presented no equal protection issue. The Supreme Court held that because Davis' claim did not amount to a deprivation of liberty or property it was not cognizable under the due process clause of the Fourteenth Amendment and therefore did not state a cause of action under Section 1983. In contrast, the present case concerns a racially motivated campaign to discredit and damage the plaintiff, resulting in serious injury to him. We agree with the district court that such an intentional tort inspired by racial animus and perpetrated under color of state law constitutes a denial of equal protection. Defendant has produced no case holding that such an action is not cognizable under Section 1983. Here the defendant was acting under color of law, and the jury found that his racially motivated actions had injured plaintiff. Such a claim is clearly within the purview of Section 1983. *Inada v. Sullivan*, 523 F.2d 485, 489 (7th Cir. 1975); *Chase v. McMasters*, 573 F.2d 1011, 1019 n.8, 1019-1020 (8th Cir. 1978); *Sherman v. Yakahi*, 549 F.2d 1287, 1290

(9th Cir. 1977); *Floyd v. Trice*, 490 F.2d 1154 (8th Cir. 1974); *Hawkins v. Town of Shaw, Miss.*, 461 F.2d 1171 (5th Cir. 1972); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972); *Jordan v. Hutcheson*, 323 F.2d 597, 601 (4th Cir. 1963); *Rafferty v. Prince George's County*, 423 F.Supp. 1045, 1050, 1052 (D. Md. 1976).

The Trial Court Did Not Err by Not Instructing the Jury That Truth and Lack of Actual Malice Are Defenses.

The defendant asserts on appeal that his public statements criticizing plaintiff's performance as a police officer were fair comment and protected by the First Amendment. Therefore, defendant claims that under *New York Times v. Sullivan*, 376 U.S. 254, he was entitled to an instruction that if the jury found that the charges he leveled at the plaintiff were true or that defendant lacked actual malice (in the sense of intentionally falsifying or recklessly disregarding the truth), he should not be held liable. However, as the district court pointed out, plaintiff's claim was not for defamation but for an intentional deprivation of equal protection of the laws (App. 26-27).[9] The fact that this deprivation was accomplished in part through speech does not allow the defendant automatically to invoke the protection of the First Amendment. The jury's findings that defendant's actions were not only racially motivated but were of an action-intended-to-injure quality establish that they were neither fair comment nor the type of speech that is protected by the First Amendment.

Moreover, it is undisputed that defendant did not attempt to establish truth or lack of actual malice as a defense, requested no instruction on those defenses, and raised the First Amendment issue for the first time in

[9] We realize that the types of injuries claimed in this case may often result from ordinary defamation. However, the ongoing campaign to have defendant relieved of his job, which was motivated by racial animus and carried out under color of law, distinguishes this case from ordinary defamation cases.

his motion for judgment notwithstanding the verdict. In these circumstances the absense of the instruction would not be error even if it would otherwise have been appropriate.

Form of Verdict Was Not So Duplicitous As to Require Reversal.

Question No. 1 of the special verdict submitted to the jury asked whether defendant's actions concerning plaintiff were racially motivated, and the jury responded affirmatively. Defendant objected at trial and still objects to the form of Question No. 2 which provided as follows:

> "*Question No. 2*: If you answered question no. 1 'Yes,' then answer this question: Was the plaintiff, Sylvester Harris, injured in any of the following respects by any racially motivated acts by the defendant, Richard Harvey, Jr.:
>
> (a) the plaintiff's reputation in the community;
>
> (b) the plaintiff's reputation and working ability within the police department;
>
> (c) the plaintiff's opportunities for advancement within the police department;
>
> (d) humiliation, embarrassment and mental distress;
>
> (e) continued employment.
>
> ANSWER: Yes
>
> (Yes or No)"

Defendant asserts that Question No. 2 is duplicitous because the jury was requested to answer whether plaintiff was injured "in any of the following respects." The evidence was sufficient for the jury to conclude that plaintiff was injured in each of the five categories, but since each category represents a compensable injury it is immaterial whether the jurors agreed on the same category. While Question No. 2 could have been framed more artfully, it does not require us to set aside the judgment on the ground that it was fatally duplicitous.

The Trial Court's Evidentiary Rulings Also Do Not Require Reversal.

Defendant first objects to the exclusion of various newspaper articles he attempted to introduce into evidence. The defense theory was that these articles would show that the defendant had been criticized for his handling of the Harris case and would therefore help to establish that his motive in speaking out against Harris was to protect the reputation of his court rather than to injure Harris out of racial animus. Many of the excluded articles do reveal public criticism leveled at defendant, but they also repeat at length the criminal charges then pending against plaintiff. Judge Gordon refused to receive them because their "damage aspects outweighed their possible injury to proprieties notwithstanding their hearsay aspects * * * [and because they are] almost entirely of a hearsay nature and without any saving grace sufficient to outweigh the lack of probative value to them" (Tr. 1098). This ruling was entirely in accord with Rule 403 of the Federal Rules of Evidence which permits a trial judge to exclude evidence whose probative value is merely cumulative or is substantially outweighed by the danger of unfair prejudice, confusion of the issues and the like. Defendant has not shown that Judge Gordon abused his discretion under that rule, especially because Judge Harvey was allowed to testify about the newspaper articles. In his brief, defense counsel claims that Judge Harvey was particularly prejudiced because plaintiff's counsel in rebuttal referred to an excluded newspaper article. The truth of the matter is that counsel for plaintiff was only rebutting defense counsel's erroneous closing statement to the jury that the January 30, 1974, edition of the Racine *Journal-Times* was in evidence.

The trial court is also criticized for having aborted defense counsel's attempt to question Captain Albro of the Racine Police Department concerning plaintiff's training, experience, and promotion. However, plaintiff's employment record, advancement and allegedly favorable treatment in the Police Department were discussed in the testimony of Captain Povkovich and Police

Chief Hagopian and in the findings of the Equal Rights Division's hearing agent.[10] Since the supposed favoritism received by Harris was already covered, it was unnecessary for Judge Gordon to receive further evidence on this subject. As the court stated, the subject of favorable treatment Harris may have received in his employment was "in evidence previously * * * [and] it's duplicative" (Tr. 404). Accordingly, Rule 403 of the Federal Rules of Evidence supported the exclusion of the additional Albro evidence.

Defendant insists that the district court should have permitted him to depose Harris as to his November 7, 1977, resignation from the Police Department which was announced to the press on November 8. The district court had ordered discovery cut off as of November 17, 1977. At a status conference on that date defendant's trial counsel incorrectly told Judge Gordon that he was "sure" that he had previously taken the deposition of plaintiff. Reacting predictably to counsel's erroneous statement that he had already deposed the plaintiff, Judge Gordon refused to permit a "second kick at the cat", adding:

> "The allegations in the complaint, which I hold before me, demonstrate a massive expression of damage that he sustained: Humiliation, distress, embarrassment, loss of credit, loss of good name, hatred of his fellow officers, threatened his life, expenditure of money, deprivation of opportunities for advancement. It seems to me that the adding of the word 'resignation' to that list would not so significantly change the claim this Plaintiff has made to justify a second examination." (Nov. 17, 1977, Tr. 8.)

On appeal, defendant has not shown that it was necessary to depose plaintiff on this subject prior to trial, particularly since the complaint and affidavits had already informed defendant that Judge Harvey's conduct had made defendant's job intolerable. 436 F.Supp.

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[10] The Equal Rights Division is part of Wisconsin's Department of Industry, Labor and Human Relations.

at 149. Even defendant's counsel denigrated the necessity for taking such a deposition by telling Judge Gordon it was no "big deal" (Nov. 17, 1977, Tr. 7)! Finally, defendant asserts that the trial judge should have permitted the jury to consider an administrative complaint filed by Harris with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations against the Racine Chief of Police and the Racine Police Department alleging employment discrimination. Defendant asserts that the dismissal of this complaint should have been considered by the jury because it reflected adversely on plaintiff's credibility. The decision (App. 59-70) and complaint were received in evidence as defendant's Exhibits 73 and 74 even though the trial judge did not consider them relevant with respect to defendant's improper conduct. However he did permit the jury to consider them as to any effect they might have upon plaintiff's damages. We agree that neither the complaint before the Wisconsin Equal Rights Division nor the decision thereon related to the merits of plaintiff's complaint against Judge Harvey. Indeed, Judge Gordon was perhaps over-liberal in receiving the exhibits even with respect to damages and in sending them to the jury room. Since defendant has not shown why these exhibits would destroy plaintiff's credibility, Rule 401 of the Federal Rules of Evidence relied upon by the defendant is inapplicable.[11]

Punitive Damages.

In his principal and reply briefs defendant does not attack the amount of the $60,000 compensatory damages assessed by the jury nor even the $200,000 punitive damages so assessed. While this Court might consider the punitive damages awarded to be unduly high, the district court explained in its post-trial opinion that the defendant had not shown that his financial circumstances required a lesser amount of punitive damages and that the court did not find the punitive

[11] Rule 401 defines relevancy. It should be noted that defendant does not rely upon Rule 608 with respect to attacking a witness' credibility so that we need not consider that rule.

damages award to be excessive or shocking to the judicial conscience since there had been "a serious abuse of judicial power" by defendant (App. 35-36). In view of the jury's finding that defendant had acted "maliciously, wantonly or oppressively,"[12] we may not disturb its award of punitive damages. However, the trial judge should consider reducing the $200,000 award if defendant can show financial hardship.

Judgment affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[12] This finding was in response to defendant's proposed instruction No. 8 (R. 27) taken from 2 Devitt and Blackmar, Federal Jury Practice and Instructions (2d ed. 1970) § 87.15 (formerly § 85.11) (Tr. 1144). The definition of malice given by the court (Tr. 1328) was also suggested by defendant (R. 27 at p. 17).

USCA 4412—Midwest Law Printing Co., Inc., Chicago—8-20-79—300

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
November 1, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

SYLVESTER HARRIS,
Plaintiff-Appellee,

No. 78-2057 vs.

RICHARD G. HARVEY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 75-C-612
Myron G. Gordon, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant Richard G. Harvey, Jr., a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judges Pell, Tone, Bauer and Cudahy voted to grant the petition for rehearing *en banc*.

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* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
November 5, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

SYLVESTER HARRIS,
Plaintiff-Appellee,

No. 78-2057 vs.

RICHARD G. HARVEY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 75-C-612
Myron G. Gordon, Judge.

ORDER

On consideration of the petition for rehearing which was denied on November 1, the panel ordered the following change to be made in the slip opinion: Page 13, eighth from last line, delete the sentence beginning with "The evidence" and continuing through to "same category" in the third and fourth from last lines of that page. Substitute the following:

> "He argues that it could have been understood to permit some jurors to find one type of injury and reject others while other jurors might find a different type of injury and reject the first. We find nothing in the form of the verdict or in the instructions suggesting that reading. Instead, the trial judge specifically instructed the jury to reach a unanimous verdict, telling them 'in order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous. All six of you who will be jurors in this case must agree.' "

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* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SYLVESTER HARRIS,
Plaintiff,
v. No. 75-C-612

RICHARD G. HARVEY, JR.,
Defendant.

DECISION and ORDER

This action is before me on the plaintiff's motion for an award of attorney's fees and the defendant's motions for judgment notwithstanding the verdict and alternative motions for a new trial or for an amendment or alteration of judgment. The plaintiff's motion will be granted. The defendant's motions will be denied.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The defendant advances several grounds in support of his motion for judgment notwithstanding the verdict. They will be considered seriatim.

The defendant argues for the first time in this case that his acts with reference to the plaintiff were an exercise of the First Amendment right to freedom of speech. The defendant relies on familiar principles of First Amendment law for the propositions that the defendant, as a public official, does not lose his First Amendment rights and that the plaintiff, Mr. Harris, if he be found to be a public official or public figure, must meet a higher burden of proof to recover on a defamation theory.

In my opinion, the body of First Amendment law relied upon by the defendant is not controlling in this action. The theory upon which the plaintiff proceeded to trial did not include a claim for defamation. The plaintiff's action, narrowed by the decision and order partially granting the defendant's motion for partial summary judgment, sought damages for a violation of his right to equal protection of the law as guaranteed by the Fourteenth Amendment. The letters which were written by the defendant to various Racine officials and the press releases he prepared and disseminated admittedly involve speech, but that does not end the matter. As the Supreme Court recently stated:

> "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed." Ohralik v. Ohio State Bar Association, 46 U.S.L.W. 4511, 4514 (May 30, 1978), *quoting* Giboney v. Empire Storage & Ice Co., 333 U.S. 490, 502 (1949).

The complaint alleges and the proof evidently persuaded the jury that the defendant intentionally acted with racial motivation to deprive the plaintiff of equal protection of the laws, thereby inflicting employment, reputational and emotional injuries on the plaintiff. Thus, this case does not involve the mere expression of the defendant's racial philosophy. Cf. Collin v. Smith, case nos. 78-1381 and 78-1385 (7th Cir. May 22, 1978). What is involved here is a state official's racially-inspired campaign to injure the plaintiff, thereby depriving him of the equal protection of the laws. Such conduct goes well beyond the area the First Amendment is designed to protect.

The defendant next urges that the plaintiff was not deprived of any "right, privilege, or immunity" secured by federal law within the meaning of 42 U.S.C. § 1983. To support this contention, the defendant characterizes this action as one for racial defamation and argues that one's embarrassment or humiliation because of racial slurs does not support an action under § 1983.

The same argument was made and rejected on the defendant's motion for partial summary judgment. Harris v. Harvey, 436 F. Supp. 143, 149-150 (E.D. Wis. 1977). This action does not merely seek damages for racial name-calling. The plaintiff's injuries were alleged to include a loss of employment opportunities, reputational and emotional injuries. Such injuries, inflicted through the racially-motivated acts of a person acting under color of state law, set forth an equal protection claim that is redressable through an action under § 1983. Furthermore, the defendant's erroneous characterization of this action as a defamation action requires the rejection of his argument that he is protected by an absolute privilege for his actions and distinguishes Barr v. Matteo, 360 U.S. 564 (1959), upon which he relies.

The defendant next argues that the evidence does not support the jury's finding that he acted with racial motivation. The defendant's subjective intent was an issue peculiarly appropriate for resolution by the jury. In my judgment, the evidence, especially the testimony of Captain Pavkovich and Assistant Chief Hagopian was sufficient to justify a jury finding that the defendant acted against the plaintiff with racial motivation.

The defendant also contends that the evidence does not sustain a finding that he acted under color of law or that he acted in the absence of all jurisdiction. I found to the contrary as a matter of law and so instructed the jury.

The "under color of law" element in a § 1983 action against a judge presents a precarious proof problem for the plaintiff. On the one hand, he must prove that the judge acted under the pretense or authority of state law, Screws v. United States, 325 U.S. 91, 111 (1944); on the other hand, the plaintiff must prove that the judge's acts were not judicial acts since the judge is absolutely immune from liability for his judicial acts. Stump v. Sparkman, 46 U.S.L.W. 4253 (March 28, 1978). Indeed, the overlapping nature of the under color of law element of § 1983 and the judicial act inquiry for immunity purposes presents a similar problem for the defendant. In this case, the defendant is simultaneously arguing that while taking the actions complained of, he was engaged in a personal pursuit unrelated to his judicial duties (so as to avoid the color of law element of § 1983) and that he was acting to protect the sanctity and dignity of his courtroom (so as to avoid a finding that he acted in the absence of all jurisdiction).

The court of appeals for the seventh circuit recently considered a case in which questions of state action and immunity were both present. The technique for addressing these two questions in the same case is made clear by the following statement appearing at page 5 of the slip opinion in Robinson v. Bergstrom, ... F.2d .... (No. 76-1620, decided June 13, 1978):

> "There appears to be no question that the requirement of 'state action' in a section 1983 claim is an essential jurisdictional predicate. *Cannon v. Univ. of Chicago,* 559 F.2d 1063 (7th Cir. 1976); *Braden v. Univ. of Pittsburgh,* 552 F.2d 948 (3rd Cir. 1977) (en banc). Accordingly, where state action is found lacking, the section 1983 complaint is properly dismissed for lack of subject matter jurisdiction. *Cannon, supra.* Alternatively a question of whether a de-

fendant is immune, either qualifiedly or absolutely, is not a jurisdictional issue. Rather, immunity is an affirmative defense which may defeat the section 1983 claim once that subject matter jurisdiction has been established. *See, e.g., Stump v. Sparkman,* . . . U.S. . . . . , U.S.L.W. 4253 (March 28, 1978); *Larsen v. Gibson,* 267 F.2d 386 (9th Cir. 1959).

"It is elementary that jurisdiction is a threshold issue, whether or not raised by a party, which must be satisfied prior to the merits. *Haley v. Childers,* 314 F.2d 610 (8th Cir. 1963).

"It is therefore obvious that the state action question, a requirement for subject matter jurisdiction, must be weighed prior to a consideration of immunity."

I was convinced at trial and remain convinced as a matter of law that the defendant acted under the pretense of his standing as a county judge. No reasonable juror, in my opinion, could find otherwise. Letters were written on official stationery. Press releases were disseminated by the defendant, identified as a county judge, through the media. The defendant brought to bear his influence as county judge on those to whom he wrote and spoke. When the defendant Judge Harvey urged the discharge of Lieutenant Harris with racial overtones in out-of-court conversations with Captain Pavkovich and Assistant Chief Hagopian, he was acting as a functionary of the state in at least as high a degree as the off-duty policeman in Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977). In my opinion, Judge Harvey's conduct easily fits the general rule stated in Roberts v. Acres, 495 F.2d 57, 59 (7th Cir. 1974), that:

". . . an individual's conduct is engaged in under color of law if clothed with the authority of the state and purporting to act thereunder, whether or not the conduct complained of was authorized."

It is equally clear that the acts taken by the defendant were not judicial acts. In Stump v. Sparkman, supra, the Supreme Court stated:

"The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.,* whether it is a function normally performed by a judge, and to the expectation of the parties, *i.e.,* whether they dealt with the judge in his judicial capacity." 46 U.S. L.W. at 4256.

Writing letters to the police chief and to other city officials to pressure the discharge of a police officer and issuing press releases about judicial proceedings are not acts normally performed by judges. These acts, hostile to the plaintiff, were perpetrated by Judge Harvey outside of his courtroom and were not even plausibly a part of his judicial functions. No reasonable interpretation of the evidence could be taken which would permit such conduct to be regarded as within his judicial capacity.

With respect to the defendant's acts complained of in this action, there were no "litigants," as such, or parties to an action whatsoever. The defendant correctly argues that he is immune from liability for conducting the John Doe proceedings inquiring into allegations of crime committed by the plaintiff. However, no liability has been imposed on that basis. I instructed the jury that damages may not be assessed against the defendant because he conducted the John Doe proceedings.

I therefore reject the defendant's arguments that the evidence was insufficient to withdraw the issues of judicial immunity and action under color of law from the jury.

MOTION FOR A NEW TRIAL

In support of his motion for a new trial, the defendant argues that several evidentiary rulings were in error, that the form of the verdict and jury charge were were [sic] erroneous, and that the verdict was against the clear weight of the evidence. The defendant also seeks a new trial based on newly discovered evidence.

The defendant argues that several newspaper articles were erroneously excluded as being hearsay. He claims that they were not offered to prove the truth of their content but rather to show their effect upon the defendant's state of mind. Prima facie, the newspaper articles are hearsay. I believe that the limited benefit to have been derived from admitting the newspaper articles for a restricted purpose was far outweighed by the potential damage which may have resulted from their receipt into evidence. Although purportedly offered not to prove the truth of the matter asserted in the articles, their introduction would have been confusing to the jurors, thereby justifying their exclusion. Rule 403, Rules of Evidence. I believe that the defendant had a fair opportunity to place his defense theory before the jury. I have reviewed the defendant's other claims of erroneous evidentiary rulings and find none of them persuasive.

The defendant asserts that the form of the verdict submitted to the jury was erroneous for several reasons. First, the defendant claims that the verdict failed to inquire whether the plaintiff was deprived of a right, privilege or immunity secured by federal law.

The right which the plaintiff claimed to have been deprived of was his right to equal protection of the laws under the Fourteenth Amendment. The verdict asked the jury to answer the question whether the actions of the defendant toward the plaintiff were racially motivated. Since the issue whether the actions of the defendant were under color of law had already been resolved against the defendant, such determination, coupled with the jury inquiry whether the defendant's acts were racially motivated, adequately placed before the jury the question whether the defendant deprived the plaintiff of his right to the equal protection of the laws.

The defendant also urges that the verdict erroneously failed to inquire of the jury whether the defendant acted under color of law and whether the defendant acted in the absence of all jurisdiction. For the reasons expressed above in connection with the motion for judgment notwithstanding the verdict, I believe that it was proper to rule on these matters as a matter of law.

The defendant next argues that the charge to the jury was erroneous because it failed adequately to define the term "racial motivation." No objection on this specific point was made at trial, and I am not now convinced that this term required definition. I also reject the defendant's argument that his own instruction on racial motivation should have been given. The defendant's proposed instruction, which I rejected, reads as follows:

> "The fact that words you may find to have been said by the defendant might be considered racially derogatory, is not sufficient without corroborating evidence to show that they reflect a state of mind of the defendant toward the plaintiff, Sylvester Harris."

I disagree with the central proposition of the defendant's proposed instruction. I believe that the use of the racially derogatory terms used by the defendant may properly form a basis for the jury's belief that he acted with a racially motivated state of mind.

The defendant also argues that it was error to instruct the jury that it could consider the acts and statements made by the defendant at the John Doe proceedings presided over by him for the limited purpose of determining whether he acted with racial motivation. It is argued that because the defendant is immune from liability for these acts and statements, the jury could not even consider such matters. The doctrine of judicial immunity protects judges from liability for the acts and statements made in the course of judicial proceedings, but the doctrine does not preclude their introduction in evidence and their consideration by the jury for the purpose of proving the judge's possible motivation on other occasions.

The defendant also argues that several of the instructions he proposed were erroneously refused. The instructions in question were excluded either because they set forth legal positions which were rejected for reasons expressed in this decision, at trial, or on the defendant's partial summary judgment motions, or because the matters they addressed were determined as a matter of law. I therefore reject the defendant's contention that there was error in the charge given to the jury.

The defendant next argues that the jury verdict is contrary to the weight of the evidence on several issues. The parties' evidence on these points was conflicting and counsel argued their respective positions at length to the jury. My review of the evidence and the jury's verdict does not leave me with the "firm conviction that a mistake has been committed." 11 C. Wright and A. Miller, Federal Practice and Procedure: Civil §2806, p. 49.

The jury awarded $60,000 in compensatory damages; found the defendant to have acted maliciously, wantonly, or oppressively; and awarded $200,000 in punitive dam-

ages to the plaintiff. The defendant claims that the evidence was insufficient to support any of these findings and seeks a new trial or an order for a new trial with a remittitur option to the plaintiff.

I believe that the evidence did justify an award of substantial compensatory damages, a finding that the defendant acted with malice, and an award of punitive damages. I do not agree with the defendant that the compensatory damage award is excessive.

The evidence demonstrated that the plaintiff's chances for further advances in employment were significantly diminished; that the plaintiff's skin broke out and that he could not sleep; and that his reputation professionally and socially was impaired. No loss of income occurred since the plaintiff's suspension from the police force was with pay. Such injuries are clearly compensable. Carey v. Piphus, 46 U.S.L.W. 4224 (March 21, 1978). The assessment of damages for the plaintiff's injuries which were occasioned by the defendant's conduct is peculiarly within the jury's scope. The evidence impressed me with the severity of Lieutenant Harris' actual damages. I believe that he proved significant injuries which were not confined to mere mental anguish. In my opinion, the jury's finding as to compensable damages is entirely fair. I can add without hesitation that my judicial conscience is not shocked by the jury's award of $60,000 for the serious impairments described by the plaintiff.

Also, I am unable to find that the punitive damages award is excessive or shocks the judicial conscience. The defendant argues that the punitive damage award is excessive because the defendant was not shown to be a wealthy man. However, the burden is on the defendant to show his financial circumstances justify a lesser amount

of punitive damages. Zarcone v. Perry, 572 F.2d 52, 56 (2d Cir. 1978). As the latter case explains, a serious abuse of official power by a judge may warrant a substantial punitive damages award; ". . . and when a jury has dealt with it severely, as it should, we will not draw fine lines to restrain its dispensation of justice." *Id.* at 57.

The defendant's motion for a new trial is also bottomed on newly discovered evidence. The evidence in question is a statement made to the media after the trial was concluded. Since this evidence was not in existence at the time of trial, it cannot be relied upon to support a motion for a new trial. Ryan v. United States Lines Co., 303 F.2d 430 (2d Cir. 1962).

Finally, the defendant seeks an amendment or alteration of judgment pursuant to Rule 59, Federal Rules of Civil Procedure. He claims that no punitive damages may be awarded and that compensatory damages may be awarded in an amount no greater than $25,000 because of Wis. Stat. § 895.43. The latter statute prescribes the procedures and limitations applicable to recovery of damages for torts committed by various state agencies, officials, and employees. The statute limits damages for torts committed by officials acting in their official capacities to $25,000 and prohibits the recovery altogether of punitive damages.

Assuming that the defendant comes within the provisions of § 895.43 as a matter of state law, I do not believe that the statute can be invoked to limit the recovery of the plaintiff in this federal civil rights action. Although both state and federal law may be utilized in determining the damages to be awarded in a federal civil rights action, Spence v. Staras, 507 F.2d 554, 558 (7th Cir. 1974), the federal district court is to invoke the rule which best

serves the policy expressed by the civil rights laws. *Id.* Since the cardinal principle for determining damage awards in civil rights cases is the principle of compensation, Carey v. Piphus, 46 U.S.L.W. 4224 (March 21, 1978), any state rule of damages which purports to limit the amount of recovery for injuries that are in fact compensable must give way. Moreover, federal law permits the recovery of punitive damages in a § 1983 action. Morales v. Haines, 486 F.2d 880, 882 (7th Cir. 1973). Accordingly, the defendant's argument that § 893.45 [sic] limits the plaintiff's recovery is without merit.

THE PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEY'S FEES

The plaintiff has applied for an award of attorney's fees. The defendant opposes such an award arguing that there is no statutory authority for doing so.

The defendant's argument is erroneous. Section 1988 of Title 42 of the United States Code provides that the court may in its discretion allow the prevailing party in a § 1983 action a reasonable attorney's fee as part of his costs. This is so even if the action was commenced, as in this case, prior to the enactment of the attorney's fees award act which amended § 1988 in 1976. Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977). Ordinarily, a prevailing plaintiff should receive an award of attorney's fees. Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 46 U.S.L.W. 4105 (January 23, 1978). In my judgment, the plaintiff is entitled to such an award in this case.

The plaintiff's counsel has supplied an affidavit stating that he expended 625 hours in the preparation for trial and the trial of this case and that his current billing

rate is $60 per hour. No breakdown of the hours spent has been supplied, however, and the affidavit states that no records were even kept after September, 1977. I am unable to make a determination on the basis of this affidavit of what an appropriate award would be in this case. The plaintiff's counsel is requested to prepare a more detailed application and affidavit explaining the hours spent and the billing rates he used throughout the history of this case. Counsel should take into consideration the factors set forth in Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 1322 (7th Cir. 1974).

Therefore, IT IS ORDERED that the defendant's motions for judgment notwithstanding the verdict, for a new trial and for alteration or amendment of the judgment be and hereby are denied.

IT IS ALSO ORDERED that the plaintiff's motion for an award of attorney's fees is granted in an amount to be determined hereafter in accordance with the instructions contained in this decision.

Dated at Milwaukee, Wisconsin, this 26 day of June, 1978.

/s/ Myron L. Gordon
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SYLVESTER HARRIS,
Plaintiff,
v. No. 75-C-612
RICHARD G. HARVEY, JR.,
Defendant.

DECISION and ORDER

The defendant Harvey has moved for partial summary judgment dismissing several portions of the plaintiff's action. Based on the record before me, including the pleadings, affidavits, exhibits, and briefs of the parties, I believe that this motion should be granted in part and denied in part.

This is an action grounded on 28 U.S.C. §§ 1343, 1331, and 42 U.S.C. §1983, in which the plaintiff seeks damages and equitable relief for deprivations under color of law of rights secured by the fourteenth amendment to the United States Constitution.

The action was brought against Richard Harvey, Jr., county judge for Racine County, and Gerald Clickner, the district attorney for Racine County. The plaintiff is a lieutenant with the Racine city police department and heads its community relations department. Mr. Harris is black and Judge Harvey and Mr. Clickner are white. As a result of this court's disposition of prior motions in this case, the defendant Clickner has been dismissed from this action. Harris v. Harvey, 419 F. Supp. 30 (E.D. Wis. 1976).

The events that gave rise to this action began in January, 1974, when the plaintiff arrested one Dale Vorlob for attacking him with a pistol. Charges of felonious battery to a police officer were brought against Vorlob. According to the complaint, Mr. Vorlob informed district attorney Clickner of an incident which allegedly occurred shortly after Mr. Vorlob's arrest in which the plaintiff pistol whipped Mr. Vorlob and threatened Mr. Vorlob with bodily harm if he were to testify at the trial.

The complaint relates that on the petition of Mr. Clickner, Judge Harvey conducted John Doe proceedings inquiring into Mr. Vorlob's allegations. As a result of the John Doe proceedings, felony and misdemeanor charges were lodged against the plaintiff. While these criminal charges were pending, Judge Harvey allegedly undertook a series of efforts to persuade the Racine police chief, the police and fire commission, and the city attorney to take disciplinary actions against the plaintiff. It is also alleged that on numerous occasions the defendant commented publicly on the merits of the charges against the plaintiff and that Judge Harvey released or threatened to release information to the press concerning these charges and other alleged wrongdoing by the plaintiff.

The plaintiff claims that the actions of the defendant Harvey were malicious and motivated by a racial animus. In support of the latter claim, the plaintiff has submitted affidavits of individuals stating that they heard Judge Harvey refer to the plaintiff in a racially derogatory manner. It is also claimed that a number of Judge Harvey's acts were taken beyond his jurisdiction as county judge.

Judge Harvey's actions have allegedly caused the plaintiff various injuries; the plaintiff claims that he has become an object of hatred of his follow [sic] officers; that

his life has been threatened; that he fears for his personal safety and the safety of his wife; that he has spent considerable sums for his legal defense; that he has been deprived of opportunities for advancement; and that he suffers loss of credit, loss of good name, humiliation, mental distress and embarrassment.

Lieutenant Harris seeks injunctive relief preventing Judge Harvey from conducting any further investigation into the plaintiff's activities. The plaintiff also requests damages for asserted denial of due process and equal protection of the laws because of the manner in which judicial proceedings were sought against him and for the reputation and employment-related injuries which he claims to have suffered.

Judge Harvey does not deny that he conducted the John Doe proceedings or that he corresponded with various Racine officials concerning imposition of discipline or other sanctions upon the plaintiff. However, the defendant denies making racially derogatory remarks about the plaintiff and also denies that any of his actions were motivated by racial prejudice, were undertaken maliciously, or were performed outside his jurisdiction.

The defendant's present motion seeks partial summary judgment dismissing several portions of the plaintiff's action. (1) As to the plaintiff's claim for injunctive relief, the defendant's motion is grounded on principles set forth in Younger v. Harris, 401 U.S. 37 (1971), and O'Shea v. Littleton, 414 U.S. 488 (1974). (2) Relying on Paul v. Davis, 424 U.S. 623 (1976), the defendant seeks summary judgment respecting the plaintiff's due process claim for damages for injury to his reputation. (3) The defendant also argues that summary judgment should be granted dismissing the equal protection aspect of the

plaintiff's action. (4) Finally, the defendant contends that summary judgment must be granted because of the doctrine of judicial immunity.

I. THE CLAIM FOR INJUNCTIVE RELIEF

Paragraph 45 of the amended complaint avers that:

> "On information and belief, Defendants Clickner and Harvey, acting under color of law, both within and without their jurisdiction, are continuing and persisting in their course of malicious conduct to intimidate, threaten and harrass Plaintiff Harris up to and including the date of this complaint causing him immediate and irreparable harm for which there is no adequate remedy at law and Defendants will continue to act both within and without their jurisdiction under color of law unless this Court grants permanent injunctive relief."

In support of the claim for injunctive relief, Lieutenant Harris has submitted several exhibits. The first exhibit, a portion of the transcript from one of the John Doe proceedings, includes an exchange in which Judge Harvey persistently warned a witness not to perjure himself by denying that he heard a conversation inculpating the plaintiff. The other exhibits allegedly show that the defendant continued publicly and privately to attack the plaintiff up to the time this action was commenced. In correspondence between the defendant and the Racine chief of police, Judge Harvey provided information from the John Doe proceedings and from other sources that the plaintiff had acted improperly on other occasions and urging that the police department conduct an internal investigation of Lieutenant Harris so as to avoid a "coverup."

The defendant advances two grounds in support of its motion for partial summary judgment dismissing the

plaintiff's claim for injunctive relief: (1) The plaintiff's claim presents no actual case or controversy as required by Article III of the Constitution; (2) Even if the case or controversy requirement is met, the plaintiff has not stated an adequate basis for equitable relief.

In support of the first of these contentions, the defendant stresses that no judicial proceedings are presently pending against Lieutenant Harris and that the plaintiff has failed to allege "sufficient facts to demonstrate that he is in any jeopardy of suffering irreparable injury if the as yet uncommenced state proceedings are not now enjoined." The defendant in this regard relies on O'Shea v. Littleton, 414 U.S. 488 (1974).

In *O'Shea,* a county magistrate and judge, among others, were sued under 42 U.S.C. §§ 1981, 1982, 1983, and 1985 for allegedly engaging in practices in the administration of a state criminal justice system which deprived the plaintiffs of rights secured in part by the fourteenth amendment. The plaintiffs sought injunctive relief preventing the defendants' imposing various procedural burdens upon nonwhite persons that were not imposed on white persons.

The Supreme Court, holding that the plaintiff's complaint failed to satisfy the jurisdictional case or controversy requirement in Article III, reasoned as follows:

> "Apparently, the proposition is that *if* respondents proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed. But it seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into

> the area of speculation and conjecture. See *Younger v. Harris,* [401 U.S. 37, at 41-42 (1971)]." 414 U.S. at 497.

Acknowledging that as a result of the plaintiff's conduct tensions were high, the Court was "nonetheless unable to conclude that the case-or-controversy requirement is satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws." *O'Shea,* supra, at 497. The Court found that under the circumstances "the threat of injury from the alleged course of conduct . . . attack[ed] is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court." *O'Shea,* supra, at 498.

I am convinced that in the instant case as well the prospect of future criminal proceedings against the plaintiff is too remote to present a case or controversy as required by Article III. The complaint and the parties' affidavits reveal that all criminal proceedings against the plaintiff that stemmed from the John Doe have been dismissed and no other charges have since been lodged against Lieutenant Harris as a result of any proceedings over which the defendant presided. Moreover, this case does not involve prosecution of an individual engaging in protest or a challenge to allegedly unconstitutional laws where the likelihood of future prosecution may be greater. See e.g. Steffel v. Thompson, 415 U.S. 452, 459 (1974).

In addition to the absence of an Article III case or controversy, the plaintiff's entitlement to equitable relief is blocked by the availability to him of adequate legal remedies. As the Supreme Court found with respect to the state criminal justice system in *O'Shea,* the Wisconsin

criminal justice system provides protections to victims of discriminatory practices:

> "[T]here are available state and federal procedures which could provide relief from the wrongful conduct alleged. Open to a victim of the discriminatory practices asserted under state law are the right to a substitution of judge or a change of venue, Ill. Rev. Stat., c. 38, §§ 114-5, 114-6 (1971) [Wis. Stats. §§ 801.58, 801.46], review on direct appeal or on postconviction collateral review, and the opportunity to demonstrate that the conduct of these judicial officers is so prejudicial to the administration of justice that available disciplinary proceedings, including the possibility of suspension or removal, are warranted. Ill. Const., Art. VI, § 15(e), [Wis. Const. Art. VII, § 13]. In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available.
>
> "Nor is it true that unless the injunction sought is available federal law will exercise no deterrent effect in these circumstances. Judges who would willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights, as this complaint alleges, must take account of 18 U.S.C. § 242. (citations omitted).
>
> "Whatever may be the case with respect to civil liability generally, see *Pierson v. Ray,* 386 U.S. 547 (1967), or civil liability for willful corruption, see *Alzua v. Johnson,* 231 U.S. 106, 110-111 (1913); *Bradley v. Fisher,* 13 Wall. 335, 347, 350, 354 (1872), we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. *Ex parte Virginia,* 100 U.S. 339 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Con-

gress. . . .' *Gravel v. United States,* 408 U.S. 606, 627 (1972)." *O'Shea,* supra, at 502-3.

While it is true that not all of these protections are available to relieve the plaintiff from a John Doe investigation, they will be available to the plaintiff in the event that such an investigation yields criminal charges. In my opinion, these legal remedies provide the plaintiff with adequate protection and, thus, he is not entitled to equitable relief. Therefore, partial summary judgment will be granted as to the plaintiff's claim for an injunction.

II. DUE PROCESS CLAIM

In my decision on the defendants' motions to dismiss, I determined that as to Judge Harvey the complaint adequately alleged a violation of the plaintiff's fourteenth amendment right to equal protection of the laws. I also decided that the complaint successfully pleaded allegations that could arguably have been undertaken "in the absence of all jurisdiction," so that the defendant Harvey's judicial immunity did not foreclose the plaintiff's recovery of damages under 42 U.S.C. § 1983. Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335 (1871). Accordingly, the plaintiff's action for both monetary and injunctive relief against the defendant Harvey survived the motion to dismiss. The defendant Clickner, however, was dismissed "because no violation of a federally protected constitutional right is charged against him and dismissal must follow pursuant to Paul v. Davis." Harris v. Harvey, 419 F. Supp. at 32.

The plaintiff erroneously reads the decision of this court and misconceives the role that Paul v. Davis, 424 U.S. 623 (1976), played in the disposition of the motion to dismiss.

Implicit in my conclusion that no claim had been stated upon which relief could be granted against the defendant Clickner was my belief that the injuries sustained by the plaintiff did not rise to the level of a deprivation of life, liberty, or property within the meaning of the due process clause of the fourteenth amendment. Paul v. Davis held that injury to reputation alone, apart from injury to some more tangible interest such as employment, does not constitute a deprivation of liberty protected by fourteenth amendment due process. The import of *Paul* is that a defamation does not become a deprivation of liberty merely because the defamer is an individual acting under color of state law. Thus, a person so defamed is not entitled to any due process protections prior to the time that the alleged defamatory conduct takes place; instead, he must subsequently resort to state law remedies.

The plaintiff makes no claim of discharge from employment. In fact, the affidavit and pleadings indicate that the plaintiff continues to work at his job with the Racine city police department. During the time that the plaintiff was suspended from his job, he received full pay. The basis for the plaintiff's claim that he has been deprived of a liberty interest is that his job has become "unsatisfying" and "nearly unbearable."

In a case very similar to the one at bar, it was held that a policeman's "temporay suspension with pay is a far cry from that 'absolute deprivation' against which the fourteenth amendment protects." Taylor v. Nichols, 499 F. Supp. 927 (D. Kan. 1976). The court of appeals for this circuit has recently held in a post-*Paul* case that an injury to reputation accompanied by a discharge from employment infringes a fourteenth amendment liberty interest even where the discharged employee does not have a

property interest in his job. Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976). Even the latter interpretation does not eliminate the necessity of a termination or nonrenewal of employment under *Paul*. For this reason, the claim against the defendant Clickner was dismissed. For the same reason, that portion of the action against the defendant Harvey, based on an alleged deprivation of the plaintiff's liberty interest, must also fail. Therefore, the plaintiff's motion for partial summary judgment dismissing the plaintiff's due process claim will be granted.

III. EQUAL PROTECTION

The bases for the plaintiff's equal protection claim are (1) that Judge Harvey, because of his racial bias against the plaintiff, sought to cause the plaintiff's firing, suspension without pay, or disciplinary action by the police department; and (2) that out of racial motivation the defendant sought the criminal prosecution of the plaintiff.

The parties have submitted evidentiary materials and argument concerning the motivation underlying the defendant's actions against the plaintiff. It is alleged that on several occasions the defendant made racially derogatory remarks about the plaintiff and that such remarks were made "to get Harris off the police force."

The plaintiff's proof consists primarily of affidavits by individuals who claim to have heard the defendant make such racial remarks. The defendant argues that the use of racially offensive terms does not prove racial motivation. He claims that his efforts to have charges brought against Lieutenant Harris and to have employment sanctions imposed were instead motivated by a belief that Lieutenant Harris had committed crimes.

I believe that the defendant's motion for summary judgment in this respect must be denied. The question whether a given act was motivated by racial discrimination requires inquiry into the subjective intent of the actor and therefore is particularly inappropriate for resolution by summary judgment. See Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) ; Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970). The parties' affidavits are sufficient to raise a factual issue as to the motivation underlying the defendant's conduct, thereby precluding summary judgment.

Judge Harvey also contends that the plaintiff has suffered no injury cognizable under the equal protection clause. It is argued that because the plaintiff was never tried and convicted of the crimes charged and was never discharged from his employment, the case against the defendant is reduced to one based on racial name-calling. The defendant proceeds from this reasoning to rely on cases holding that racial name-calling does not amount to a denial of equal protection. El-Em Band of Pomo Indians v. 49th District Agricultural Fair Association, 359 F. Supp. 1044 (N.D. Cal. 1973) ; Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1968).

The defendant erroneously believes that Paul v. Davis, supra, requires that a deprivation of life, liberty, or property be established in all fourteenth amendment cases. In my opinion, *Paul* relates to due process and does not control a claim based upon an alleged denial of equal protection of the laws. An individual who has suffered injuries as a result of unjustified invidious discrimination, may be able to establish an equal protection violation regardless whether such injuries rise to the level of deprivations of life, liberty, or property.

The plaintiff has averred several significant injuries in his complaint, including loss of credit, injury to reputation, and a deprivation of opportunities for advancement in his employment. Such injuries, standing alone, are insufficient to invoke procedural due process. However, if they are inflicted, as alleged, through racially discriminatory treatment, they are sufficient under the law to support a claim based on a denial of equal protection of the laws.

Accordingly, the defendant's motion for summary judgment dismissing the plaintiff's equal protection claim will be denied.

IV. JUDICIAL IMMUNITY

Judge Harvey next argues that the doctrine of judicial immunity shields him from liability for damages for several of his acts complained of by the plaintiff. Both parties agree that the immunity is applicable "even where the judge is accused of acting maliciously and corruptly. . . ." Pierson v. Ray, 386 U.S. 547, 554 (1967). The parties also acknowledge that a judge acting "in excess" of his jurisdiction is still immune and that he may be sued for damages only when he has acted in the "clear absence of all jurisdiction over the subject matter. . . ." Bradley v. Fisher, 13 Wall. 335, 351, 80 U.S. 335 (1871). Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977); Jacobson v. Schaefer, 441 F.2d 127, 129 (7th Cir. 1971).

The defendant first argues that summary judgment should be granted as to the allegations that he maliciously and unfairly conducted judicial proceedings inquiring into the plaintiff's activities. The defendant argues that these acts were performed within his jurisdiction as county judge.

The plaintiff has responded that the doctrine of judicial immunity does not bar an action *for equitable relief* even if the judicial officer were acting within his jurisdiction. Jacobson v. Schaefer, supra. The plaintiff has complained about the circumstances attending Judge Harvey's judicial proceedings only in support of his claim for equitable relief. Since I have ruled that the claim for equitable relief must be dismissed, it is unnecessary to address this portion of the defendant's motion.

However, the defendant has also raised the judicial immunity defense with respect to certain acts unrelated to the John Doe proceedings which he conducted concerning the plaintiff.

The plaintiff has alleged that Judge Harvey informed a newspaper reporter what had transpired at the secret John Doe proceedings and that charges would be brought against the plaintiff. On another occasion, the defendant allegedly held a press conference to reveal the charges against the plaintiff and the fact that the plaintiff refused to testify at the John Doe. (complaint, ¶s 22-25). While these two allegations may have been included in the complaint solely to support the now-dismissed due process claim, a fair reading of the complaint suggests that the allegations may also relate to the plaintiff's equal protection claim.

The defendant contends that even if these allegations were true, these acts fell within his subject matter jurisdiction and that he is immune from liability for damages. Since the defendant has cited no authority, either legal or factual, in support of this contention, I decline to alter my prior determination that the judge may not claim immunity from suit regarding the allegations in paragraphs 22 and 25 of the complaint. Therefore, the defen-

dant's motion for summary judgment dismissing the plaintiff's claim insofar as it relies upon the allegations in paragraphs 22 and 25 will be denied.

Paragraph 30 of the complaint alleges that the defendant, acting beyond his jurisdiction, maliciously executed an affidavit containing racial and other derogatory remarks about the plaintiff and submitted it in a legal proceeding in which he was neither a party nor an attorney. In my previous decision, I held that this act, if proved, could arguably constitute an absence of all jurisdiction. Harris v. Harvey, 419 F. Supp. 30, 31 (1976).

Based on the present record, I now believe that the plaintiff is foreclosed from the recovery of damages based on the allegation in paragraph 30 of the complaint.

The affidavit containing remarks about the plaintiff was submitted in state court habeas corpus proceedings challenging the defendant's actions in the John Doe proceedings and other matters relating to the administration of the defendant's court. The plaintiff's petition for habeas corpus was grounded on the defendant's alleged racial prejudice. It is now apparent that the legal proceeding in which the affidavit was submitted was intimately related to matters within the jurisdiction of the defendant's court.

The concept of judicial immunity is broad enough to shield a judge from liability for his efforts to justify in habeas corpus proceedings the determinations arrived at in matters over which he had subject matter jurisdiction. I will therefore grant summary judgment to the defendant as to the allegations contained in paragraph 30 of the complaint.

Therefore, IT IS ORDERED that the defendant's motion for summary judgment dismissing the plaintiff's claim for injunctive relief be and hereby is granted.

IT IS ALSO ORDERED that the defendant's motion for summary judgment dismissing the plaintiff's due process claim be and hereby is granted.

IT IS FURTHER ORDERED that the defendant's motion for summary judgment dismissing the plaintiff's equal protection claim be and hereby is denied.

IT IS FURTHER ORDERED that the defendant's motion for summary judgment on the basis of judicial immunity be and hereby is granted in part and denied in part as set forth in this decision.

Dated at Milwaukee, Wisconsin, this 30 day of June, 1977.

/s/ Myron L. Gordon
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SYLVESTER HARRIS,
Plaintiff,
v.
No. 75-C-612
RICHARD G. HARVEY, JR. and
GERALD CLICKNER,
Defendants.

DECISION and ORDER

Both defendants have moved to dismiss this action and, in the event such motion is not granted, the defendant, Judge Harvey, has moved for a protective order limiting the area of inquiry at a future deposition hearing.

The action is brought pursuant to 42 U.S.C. § 1983. In a comprehensive complaint consisting of 47 numbered paragraphs, the plaintiff alleges that he was deprived of his constitutional rights by the defendant Harvey, a county court judge of Racine county, and by the defendant Clickner, the district attorney of Racine county. A variety of wrongs is attributed to the two defendants, who are white, against the plaintiff, who is a black Racine police lieutenant.

The motion to dismiss relies in part on a claim of immunity by both the defendants. They also contend that the acts charged against them were not under color of state law. In addition, the defendants urge that the plaintiff was not deprived of any rights protected by the Constitution of the United States.

With reference to the immunity defense, the law is clear that a judge and a district attorney, who are acting

within their jurisdiction, are exempt from monetary liability, even when their acts are alleged to be malicious. Pierson v. Ray, 386 U.S. 547 (1967); Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971). The immunity afforded to judges has been extended to public prosecutors. In Imbler v. Patchman, ... U.S. .... (1976), 44 U.S.L.W. 4250 (March 2, 1976), the Court said that "a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties." (U.S.L.W. p. 4253). Since monetary damages are not sought in this action from the defendant Clickner, the *Imbler* immunity is not really applicable.

The complaint in the instant case expressly alleges that a number of the acts attributed to the defendants were committed outside of their jurisdictions. The court is mindful of the admonition of the court of appeals for the seventh circuit in Jacobson v. Schaefer, supra, where at page 129 the court notes that a judge may be liable for damages only when he has acted "in the clear absence of all jurisdiction over the subject matter." The conduct of Judge Harvey described in complaint paragraphs 22, 25, 27, 28, 29, 30, 31, 37 and 38, if proved, could arguably constitute an "absence of all jurisdiction." A fair reading of the complaint persuades me that upon the present state of the record, Judge Harvey is not entitled to dismissal as to the plaintiff's action for monetary relief.

I find no merit in the defendant's argument that this action cannot be brought under § 1983 because of an absence of a showing that the acts were performed under color of state law. Fairly construed, I think it is clear that § 1983 may not be denied to the use of the plaintiff on this ground.

With reference to the contention that there has been no deprivation of the plaintiff's rights which are secured

by the United States Constitution, I note that in paragraphs 15, 16, 17 and 30, of the complaint there are specific references to racial aspects. Those paragraphs read as follows:

> "15. On information and belief, prior to January 9, 1974, Richard Harvey, Jr. had stated to Racine Assistant Chief of Police Hagopian, that he was going to get that 'black bastard', Harris."
>
> "16. On information and belief, on many occasions prior to January 21, 1974, Defendant Harvey, under color of law but beyond his jurisdiction, maliciously stated to many people that Plaintiff Harris received preferential treatment from the Racine Police Department and that Harris received favors because he was black."
>
> "17. On information and belief, on or before January 9, 1974, Defendant Harvey maliciously made racial remarks which were intended to reflect upon associates, friends and attorneys of Harris in an effort to have them disassociate themselves from Plaintiff Harris."
>
> "30. On information and belief, on or about March 11, 1974, Defendant Harvey, acting under color of law but beyond his jurisdiction as County Judge, deliberately, maliciously and intentionally executed an affidavit and submitted the affidavit in a legal proceeding in which he was neither a party, nor an attorney and in that affidavit made racial and derogatory remarks about Harris before Harris had been tried on any of the criminal complaints issued by Harvey."

The racial overtones of the complaint persuade me that this court has jurisdiction under § 1983, so far as the conduct of Judge Harvey is concerned, notwithstanding the decision in Paul v. Davis, ... U.S. ...., 44 U.S.L.W. 4337 (March 23, 1976). That case made it clear that one who

has suffered a defamation has not sustained a deprivation of a federally protected right.

Paul v. Davis contemplates that one who would sue in federal court under § 1983 must point to a "specific constitutional guarantee safeguarding the interest he asserts has been invaded." (Slip opinion p. 7). In the case at bar, there are numerous acts attributed to Judge Harvey which were allegedly racially motivated. They are itemized with sufficient clarity so as to foreclose this court from granting dismissal as to Judge Harvey. A violation of Mr. Harris' fourteenth amendment right to equal protection of the laws has been adequately alleged. It follows, therefore, that Judge Harvey's motion to dismiss may not be granted, and the plaintiff's action against him, both as to monetary and injunctive relief, must stand.

As previously noted, damages are not sought from Mr. Clickner, and, thus, the immunity of a prosecutor does not insulate him from this action. However, this § 1983 action may not be pursued against Mr. Clickner because no violation of a federally protected constitutional right is charged against him and dismissal must follow pursuant to Paul v. Davis. The wrongs attributed by the plaintiff to Mr. Clickner do not support a § 1983 action in federal court.

With reference to the motion for a protective order, Judge Harvey urges that the plaintiff should be barred from inquiring into various subject matter areas. I have examined the contents of this motion and conclude that the better exercise of the court's discretion pursuant to Rule 26(c), Federal Rules of Civil Procedure, is to deny the defendant's motion.

Therefore, IT IS ORDERED that the motion of the defendant Harvey for dismissal be and hereby is denied.

IT IS ALSO ORDERED that the motion of the defendant Clickner for dismissal be and hereby is granted.

IT IS FURTHER ORDERED that the motion of the defendant Harvey for a protective order be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 5 day of August, 1976.

/s/ Myron L. Gordon
U.S. District Judge

Supreme Court, U.S.
FILED
FEB 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

vs.

SYLVESTER HARRIS,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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February 28, 1980

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1172

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

A R G U M E N T

INTRODUCTION

The image presented by the Petitioner in his statement of the case ignores the gravamen of Respondent's complaint, i.e. that Petitioner, under the pretense of acting as a county judge, denied Respondent equal protection of the law by publicly and privately, through correspondence and use of the media, attempting to have Respondent terminated from employment and despised in the community because of Respondent's race. The evidence of the racial discrimination of the Petitioner was described by the Seventh Circuit in a footnote when it stated:

> For sake of brevity we will not summarize the copious evidence as to defendant's racial motivation. Since it was overwhelming, defendant

does not even contend otherwise in his reply brief . . . (App. 4).

Petitioner would like to present an image by his statement of the case that is at variance with the record, the jury verdict, the trial court's decision and the opinion of the Circuit Court. The jury found, the trial court confirmed and the Appeals Court affirmed that the Petitioner's racially motivated conduct, while he functioned under the pretense of his judgeship, severely injured the Respondent.

> The complaint alleges and the proof evidently persuaded the jury that the defendant intentionally acted with racial motivation to deprive the plaintiff of equal protection of the laws, thereby inflicting employment, reputational and emotional injuries on the plaintiff. (App.23).

Some few examples from the record set forth the type of remarks which the judge directed to Respondent's superior officers prior to Petitioner's effort to have Respondent removed from the police force.

In 1973 the Petitioner asked Harris' superior officer, "When are you going to can that black bastard?" (T 102). Another time he yelled, "For Christ's sake, Captain, when are you going to get rid of that black bastard?" (T 102). On yet another occasion the Petitioner referred to Respondent as "that goddamned nigger" (T 104). The Petitioner told another officer, "The Police Department would be better off without the nigger." (T 50-51). He also suggested "sending black paint to Harris' lawyer and friends to enable themselves to be black like Harris" (T 53).

The Seventh Circuit recited the allegations of the Complaint in its decision. (App. 2-5). These allegations substantially set forth in bare-bones form the proof submitted by Respondent. Petitioner's statement of facts does not represent the proof offered. It does not treat the evidence most favorable to Respondent, but instead distorts and misstates facts in a web-spinning effort to bolster its position in the case. A complete exposition of the record may be gleaned from the opinions of the trial judge and appellate court rather than from Petitioner's stilted presentation.

REASONS FOR DENYING WRIT

Petitioner's issues do not set forth any special and important reasons why this Court should grant a writ of certiorari. When measured against the criteria set forth in Sup. Ct. R. 19, Petitioner is found lacking in all respects.

The decision of the Appeals Court is not at variance with any ruling of this Court. There is no federal question which should be decided by this Court. Quite the contrary, the decision of the Court of Appeals is in complete accord with the latest decisions of this Court in the area of judicial immunity. Finally, he presents no conflict between this opinion and that of other Circuit Courts of Appeal.

I.

JUDICIAL IMMUNITY

As recently as 1978 this Court rendered the latest in a long line of decisions clarifying the doctrine of judicial immunity. The decision in Stump v. Sparkman, 435 U.S. 349 (1978) set down specific guidelines which are to be considered when one is immune. This Court ruled that a judge is immune from monetary damages for acts which are judicial. This decision was extremely helpful to the Court of Appeals because for the first time lower courts were given specific guidelines for determining whether an act was judicial. The guidelines which characterize an act as judicial and therefore providing monetary immunity were:

> . . . whether it is a function normally performed by a Judge and to the expectation of the parties . . . Id. at 362.

The Seventh Circuit followed this decision in both letter and spirit.

> . . . The trial judge properly applied the rule of Stump v. Sparkman, 435 U.S. 349, in holding that the acts perpetrated outside of Judge Harvey's courtroom and not then a part of his

judicial functions were undertaken in the "absence of all jurisdiction." These acts involved the defendant's repeated communications to the press and to city officials over the course of more than a year. These communications were critical of plaintiff and called for action to be taken against him. Many of them were made while plaintiff was awaiting trial on the criminal charges stemming from the John Doe proceeding. Such acts were not judicial because they were not functions normally performed by a judge, and were not "to the expectations of the parties" in that as to these acts the parties did not deal with him in his judicial capacity. 435 U.S. at 362. Accordingly, the trial judge instructed the jury that although damages could not be assessed against Judge Harvey for conducting the John Doe proceedings, he could be held liable for his extra-judicial acts. Since no liability was imposed where Judge Harvey enjoyed judicial immunity, no error was committed on that score. (App. 8).

Petitioner is unable to cite any authority for its proposition that the Court of Appeals erred in this respect. The only case cited is a decision of this Court in a criminal case ruling on a constitutional privilege, U.S. v. Helstoski, —U.S.—, 99 S. Ct. 2432 (1979). The instant case does not revolve upon a constitutional or criminal matter. To that extent Helstoski is neither persuasive nor controlling, but is readily distinguishable.

II.

COLOR OF LAW

In its opinion, the Court of Appeals noted that Counsel for the Petitioner agreed during oral argument that Petitioner was acting under color of law. Now he urges this Court to grant the writ because the Appeals Court agreed with his position.

> Defendant's counsel conceded at oral argument that a judge could act under color of law and yet in the absence of all jurisdiction. Counsel for the Voluntary Association of Trial Judges of Wisconsin, appearing as "amicus curiae," conceded that Judge Harvey was acting under color of law. (App. 12).

It is of no little interest to note that the attorney referred to in the above footnote as counsel for "amicus" is none other than Mr. Sundquist who now appears with Mr. Capwell as attorney for Petitioner.

The trial court sets forth some of the actions of the Petitioner which bring his actions under color of law.

> I was convinced at trial and remain convinced as a matter of law that the defendant acted under the pretense of his standing as a county judge. No reasonable juror, in my opinion, could find otherwise. Letters were written on offical stationery. Press releases were disseminated by the defendant, identified as a county judge, through the media. The defendant brought to bear his influence as county judge on those to whom he wrote and spoke. When the defendant Judge Harvey urged the discharge of Lieutenant Harris with racial overtones in out-of-court conversations with Captain Pavkovich and Assistant Chief Hagopian, he was acting as a functionary of the state in at least as high a degree as the off-duty policeman in Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977). (App. 26).

III.

FIRST AMENDMENT

An examination of Petitioner's responsive pleadings and trial transcript will reveal no allegations of a defense based upon first amendment rights. The Petitioner raised this question for the first time in motions after verdict. (App. 22).

Petitioner seeks protection under the free speech clause by characterizing this action as one sounding in defamation.

He ignores the pleadings, the trial court, and the Appeals Court which all represent that this case is one of denial of equal protection. The trial court stated:

> The theory upon which the plaintiff proceeded to trial did not include a claim for defamation. The plaintiff's action, narrowed by the decision and order partially granting the defendant's motion for partial summary judgment, sought damages for a violation of his right to equal protection of the law as guaranteed by the Fourteenth Amendment. The letters which were written by the defendant to various Racine officials and the press releases he prepared and disseminated admittedly involve speech, but that does not end the matter. As the Supreme Court recently stated:
>
> > [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed. Ohralik v. Ohio State Bar Association, 46 U.S.L.W. 4511, 4514 (May 30, 1978), *quoting* Giboney v. Empire Storage & Ice Co., 333 U.S. 490, 502 (1949). (App. 23).

In affirming this decision, the Seventh Circuit held:

However, as the district court pointed out, plaintiff's claim was not for defamation but for an intentional deprivation of equal protection of the laws. (App. 26-27). The fact that this deprivation was accomplished in part through speech does not allow the defendant automatically to invoke the protection of the First Amendment. The jury's findings that defendant's actions were not only racially motivated but were of an action-intended-to-injure quality establish that they were neither fair comment nor the type of speech that is protected by the First Amendment. (App.14).

IV.

EQUAL PROTECTION

Petitioner also argues that Respondent has not been deprived of any right, privilege or immunity under federal law. The Court of Appeals relied upon Adickes v. Kress & Co., 398 U.S. 144 (1970), for the proposition that one has a constitutional right to be free from racial discrimination. The jury found that Petitioner was racially motivated in his actions toward Respondent and this racial motivation was a denial of equal protection. This right to be free from racial discrimination was denied Respondent by Petitioner while Petitioner was acting under pretense of his judgeship. The Petitioner's actions severely injured Respondent in work related activities, his reputation within the community and the police department. The trial Judge wrote:

> The evidence demonstrated that the plaintiff's chances for further advances in employment were significantly diminished; that the plaintiff's skin broke out and that he could not sleep; and that his reputation professionally and socially was impaired. No loss of income occurred since the plaintiff's suspension from the police force was with pay. Such injuries are clearly compensable. Carey v. Piphus, —U.S.—(1978). (App. 31).

C O N C L U S I O N

Petitioner presents no reason under Sup. Ct. R. 19 why his petition should be granted. There are no decisions from other courts of appeals which are at variance with this decision. This decision is in conformity with this court's holdings on judicial immunity.

In conclusion, Respondent submits that this case and decision are extraordinary only in the nature and extent of the abuse bestowed upon the Respondent and, therefore, requests that the petition for writ of certiorari be denied.

Respectfully submitted,

Paul J. Gossens
Attorney for Respondent

Supreme Court, U.S.
FILED
MAR 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

vs.

SYLVESTER HARRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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February 29, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

v.

SYLVESTER HARRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Respondent states that "petitioner's issues do not set forth any special and important reasons why this Court should grant a writ of certiorari. (Brief in Opp., p. 3). Not true. Unless reversed, this case stands for the proposition that a jury may consider purely judicial acts of a sitting judge

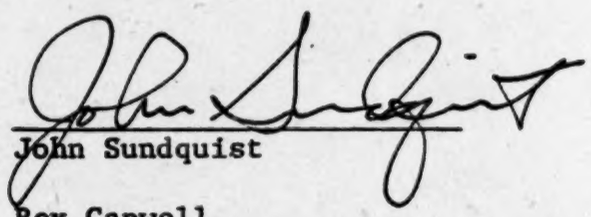
to determine his state of mind or motive for each and every subsequent action taken by the judge with respect to a dissatisfied litigant. This circumvents judicial immunity by permitting the jury to view purely judicial acts of a judge from the bench in determining his liability for subsequent acts.

In order to fairly and freely administer justice, a judge must be allowed to determine the issues before him unfettered by the fear of later suits by litigants based in any part upon the judge's legal decision.

Nowhere does respondent directly address the focal issue of judicial immunity in his response to the petition. Rather, respondent dwells upon his view of the facts, quoting a number of statements allegedly showing that the petitioner was racially motivated. (Brief in Opp., p. 2). Even if true these statements were remote in time to the actions complained of, were not publicly disseminated and were testified to by white officers who petitioner had accused of wrongdoing.

Respondent refers to the decision of the Court of Appeals for "a complete exposition of the record." (Brief in Opp., p. 2). That decision makes no attempt to discuss the facts adduced at trial but simply recites the allegations of the complaint. The complaint, typically, does not recite facts but only the pleader's florid allegations. Although this is not the appropriate occasion to discuss the facts, many of the allegations of the complaint, adopted by the Court of Appeals, are devoid of support in the record. This unusual approach by the Court of Appeals is characteristic of its superficial analysis of the important legal issues involved and the unprecedented and harsh results attained.

Respectfully submitted,



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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

v.

SYLVESTER HARRIS,

Respondent.

BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN

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February 27, 1980

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

v.

SYLVESTER HARRIS,

Respondent.

CONSENT TO FILING OF
BRIEF AMICUS CURIAE

This brief is presented for the State of Wisconsin sponsored by its Attorney General at the request of the governor under authority of sec. 165.25(6), Wis. Stats. Accordingly, consent of parties to the case is not required.

INTEREST OF AMICUS CURIAE

The State of Wisconsin is interested in the issue of judicial immunity of its judges, as it has arisen in the above-captioned case. The state believes its participation as amicus curiae is especially important in that the significance of this case goes beyond the party litigants, and affects the interest of the State in the functioning and control of its trial judges. For that reason, the State of Wisconsin believes that the questions relating to judicial immunity may not be adequately presented by the parties, particularly as they relate to the functioning and control of its trial judges.

ARGUMENT

The State of Wisconsin urges this court to grant the petition for certiorari in the above-captioned case to settle important questions of vital interest to the State of Wisconsin.

The state submits a clear and direct resolution by this court of the issue of judicial immunity is necessary to the functioning of a proper and independent judiciary in the state. There are presently 181 circuit judges in this state, and there are at least 23 damage suits pending against these judges. The state is concerned that unless this court clearly resolves the issue of judicial immunity, the number of such suits will only increase and hamper the proper functioning of the judiciary.

In addition, the state submits a resolution of the issue of judicial immunity by this court will clarify the role of the private suit for damages in the disciplining and control of the state judiciary.

The constitution and laws of the State of Wisconsin provide for control of the state judiciary. Wisconsin Constitution art. VII, sec. 1, and sec. 17.06, Wis. Stats., provides judges may be removed by trial by the senate after impeachment by the assembly. Wisconsin Constitution art. VII, sec. 11, provides they may be reprimanded, censured or removed by the Wisconsin Supreme Court. Wisconsin Constitution art. VII, sec. 13 and sec. 17.09(4), Wis. Stats., provides for removal of judges by address of the senate and assembly. Section 757.85,

Wis. Stats., provides for creation of a Judicial Commission, and subsequent sections provide for investigation of allegations of misconduct or disability of judges, procedures for hearing and disposition by the Wisconsin Supreme Court. Finally, Wis. Const. art. XIII, sec. 12 and sec. 9.10, Wis. Stats., provides for removal of judges by recall vote of the people of Wisconsin.

The State is concerned that, unless this court resolves the issue of judicial immunity, the answerability of judges in the State of Wisconsin to sanctions other than those provided in its constitution and laws will not be clear, to the detriment of the proper functioning of the state judiciary.

CONCLUSION

The State of Wisconsin respectfully requests the court grant the petition

for certiorari to resolve questions of great significance to the State of Wisconsin.

Respectfully submitted,

Bronson C. La Follette
Attorney General
114 East, State Capitol
Madison, Wisconsin 53702

Dated February 27, 1980

APPENDIX

Wis. Const. art. VII, sec. 1:

Impeachment; trial. SECTION 1. [*As amended Nov. 1932*] The court for the trial of impeachments shall be composed of the senate. The assembly shall have the power of impeaching all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors; but a majority of all the members elected shall concur in an impeachment. On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court. No judicial officer shall exercise his office, after he shall have been impeached, until his acquittal. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to evidence; and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold any office of honor, profit or trust under the state; but the party impeached shall be liable to indictment, trial and punishment according to law. [*1929 J.R. 72, 1931 J.R. 58, vote Nov. 1932*]

Wis. Const. art. VII, sec. 11:

Disciplinary proceedings. SECTION 11. [*As created April 1977*] Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law. No justice or judge removed for cause shall be eligible for reappointment or temporary service. This section is alternative to, and cumulative with, the methods of removal provided in sections 1 and 13 of this article and section 12 of article XIII. [*1975 J.R. 13, 1977 J.R. 7, vote April 1977*]

Wis. Const. art. VII, sec. 13:

Justices and judges: removal by address. SECTION 13. [*As amended April 1974 and April 1977*] Any justice or judge may be removed from office by address of both houses of the legislature, if two-thirds of all the members elected to each house concur therein, but no removal shall be made by virtue of this section unless the justice or judge complained of is served with a copy of the charges, as the ground of address, and has had an opportunity of being heard. On the question of removal, the ayes and noes shall be entered on the journals. [*1971 J.R. 30, 1973 J.R. 25, vote April 1974; 1975 J.R. 13, 1977 J.R. 7, vote April 1977*]

Wis. Const. art. XIII, sec. 12:

Recall of elective officers. SECTION 12. [*As created Nov. 1926*] The qualified electors of the state or of any county or of any congressional, judicial or legislative district may petition for the recall of any elective officer after the first year of the term for which he was elected, by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding the recall of such officer. Such petition shall be signed by electors equal in number to at least twenty-five per cent of the vote cast for the office of governor at the last preceding election, in the state, county or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election to be held not less than forty nor more than forty-five days from the filing of such petition. The officer against whom such petition has been filed shall continue to perform the duties of his office until the result of such special election shall have been officially declared. Other candidates for such office may be nominated in the manner as is provided by law in primary elections. The candidate who shall receive the highest number

of votes shall be deemed elected for the remainder of the term. The name of the candidate against whom the recall petition is filed shall go on the ticket unless he resigns within ten days after the filing of the petition. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected. This article shall be self-executing and all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but no law shall be enacted to hamper, restrict or impair the right of recall. [*1923 J.R. 73, 1925 J.R. 16, 1925 c. 270, vote Nov. 1926*]

Sec. 9.10, Wis. Stats:

9.10 Recall. (1) The qualified electors of the state, of any county, city, village, town, or of any congressional, legislative, judicial or school district may petition for the recall of any elective official after the first year of the term for which the official is elected by filing a petition with the same official or agency with whom the petition for nomination to the office was filed demanding the recall of the officeholder. The petition shall be signed by electors equal to at least 25% of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled. If at the last election any group of candidates were voted for in common to fill 2 or more offices of the same designation, the required number of petition signers shall be equal to 25% of the number computed by dividing the total vote for that office by the number of offices filled jointly.

(2) (a) The preparation and form of the recall petition shall be governed by s. 8.15. In addition, a recall petition for a city, village, town or school district office shall contain a specific statement of good and sufficient reason upon which removal is sought.

(b) After the recall petition has been offered for filing, no name shall be erased or removed. No signature shall be valid or counted unless the date is less than 60 days before the date offered for filing.

(3) (a) The provisions of this subsection apply for the recall of all elective officials other than city, village, town and school district officials. City, village, town and school district officials are recalled under sub. (4).

(b) Within 3 days after the petition is offered for filing, the official with whom the petition is left shall determine by careful examination whether the petition is sufficient and so state in a certificate attached to the petition. If the petition is found to be insufficient, the certificate shall state the particulars creating the insufficiency. The petition may be amended to correct any insufficiency within 5 days following the affixing of the original certificate. Within 2 days after the offering of the amended petition for filing, it shall again be carefully examined to determine sufficiency and a certificate stating the findings shall be attached. Immediately upon finding an original or amended petition sufficient, the official shall file the petition and call a special election to be held not less than 40 nor more than 45 days from the filing date.

(c) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns within 10 days after the original filing of the petition. There shall be no primary. Candidates for the office may be nominated under the usual procedure of nomination for a primary election by filing nomination papers not later than 5 p.m. 4 weeks preceding the election and have their names placed on the ballot at the special election.

(4) (a) For the recall of any city, village, town or school district official, the municipal clerk shall verify the eligibility of the respective signers and circulators, shall certify thereto and shall transmit the petition to the clerk of circuit court within 10 days of the filing date. The circuit court within 10 days after receipt of the petition shall determine by hearing whether the petition states good and sufficient reason for the

recall. The clerk of circuit court shall notify the incumbent of the hearing date. The person subject to recall and the petition circulators may appear by counsel and the court may take testimony with respect to the recall petition. If the circuit court judge determines the grounds stated in the petition and proof offered at the hearing show good and sufficient reasons for recall, the judge shall issue a certificate directing the governing body or school board to hold an election under this section. If the grounds stated in the petition and proof offered at the hearing do not show good and sufficient reason for recall, issuance of the certificate shall be denied. Any party aggrieved by the circuit court determination may appeal to the court of appeals within 10 days following the circuit court determination by filing a notice of appeal with the clerk of the court of appeals. An appeal under this section shall have preference on the court of appeals calendar. The appeal shall stay enforcement of a certificate issued by the circuit court until the court of appeals determines the appeal. The governing body or school board upon receiving the certificate from the circuit court shall call a special election not less than 50 nor more than 60 days from the date of the certificate. The special election for recall of more than one official may be held on the same day.

(b) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns before the deadline for filing nomination papers. Other qualified persons may become candidates by filing their nomination papers not later than 5 p.m. of the day 6 weeks before the day of the election. If the number of candidates including the incumbent, when he is a candidate, is more than twice the number of offices of that designation to be filled, a special primary shall be held. The incumbent's name shall not appear on the primary ballot. When a primary is held, the name of the person receiving the highest number of votes shall be placed on the special election ballot with the incumbent. When the incumbent is not a candidate, the 2 persons receiving the highest number of votes shall be placed on the special election ballot. When an election to recall more than one official of the same designation is held at the same time, the names of all candidates nominated

shall be grouped together on the ballot with instructions to vote for the number of offices to be filled.

(5) The official against whom a recall petition has been filed shall continue to perform the duties of his office until the result of the special election is officially declared. The person receiving the highest number of votes at the special election shall be declared elected for the remainder of the term. If the incumbent receives the highest number of votes he shall continue in office. If another receives the highest number of votes he shall succeed the incumbent if he qualifies within 10 days after receiving notification.

(6) After one recall petition and special election, no further recall petition shall be filed against the same official during the term for which he was elected.

(7) The purpose of this section is to facilitate the operation of article XIII, section 12, of the constitution and to extend the same rights to electors of cities, villages, towns and school districts.

Sec. 17.06, Wis. Stats.:

17.06 Removal state officers; impeachment; address. (1) Any civil officer of this state may be removed from office by impeachment for corrupt conduct in office, or for crimes and misdemeanors as provided in section 1, article VII of the constitution; and any supreme court justice or circuit court judge may also be removed from office by address of both houses of the legislature as provided in section 13, article VII of the constitution.

(2) In this section, "address" means a procedure for removal of a judge from office based on a document entitled "Address" which specifies charges against a judge alleging misconduct or that he is not physically or mentally qualified to exercise the judicial functions of his office. A copy of the address containing the charges against him shall be served upon the judge. The judge shall have the opportunity of being heard in his defense and he may be removed from office by address of both houses of the legislature if two-thirds of all members elected to each house concur therein.

Sec. 17.09, Wis. Stats.:

17.09 Removal of elective county officers. Elective county officers may be removed from office as follows:

(1) COUNTY CLERK; TREASURER; SURVEYOR; SUPERVISOR. The county clerk, county treasurer or surveyor, or a county supervisor, by the county board, for cause, by a vote of two-thirds of all the supervisors entitled to seats on such board.

(2) CLERK OF CIRCUIT COURT. The clerk of the circuit court, by the judge or a majority of judges of the circuit court for the clerk's county, for cause.

(4) JUDGES. The county judge, by address of both houses of the legislature in the manner provided in the constitution for the removal of justices of the supreme court or judges of the circuit courts.

(5) OTHER ELECTIVE COUNTY OFFICERS. The sheriff, coroner, register of deeds or district attorney, by the governor, for cause.

Sec. 165.25, Wis. Stats.:

165.25 Duties of department of justice. The department of justice shall:

(1) REPRESENT STATE. Except as provided in s. 59.47 (7), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, if requested by the governor or either branch of the legislature, appear for the state and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people thereof may be interested. All expenses of the proceedings shall be paid from the appropriation under s. 20.455 (1) (d).

(2) PROSECUTE BREACHES OF BONDS AND CONTRACTS. Prosecute, at the request of the governor, or of the head of any department of the state government any official bond or any contract in which the state is interested, deposited with any of them, upon a breach thereof, and prosecute or defend for the state all actions, civil or criminal, relating to any matter connected with any of their departments except in those cases where other provision is made.

(3) ADVISE DISTRICT ATTORNEYS. Consult and advise with the district attorneys when requested by them in all matters pertaining to the duties of their office.

(4) FURNISH LEGAL SERVICES; APPROPRIATION. The department of justice shall furnish all legal services required by the investment board, the department of transportation, the department of natural resources, the state teachers retirement board and the Wisconsin retirement fund board, together with such other services, including stenographic and investigational, as are necessarily connected with such legal work. The department shall at the end of each fiscal year, except for programs financed out of the general fund, render to the respective departments herein enumerated an itemized statement of the total cost of such legal and other services including travel expenses and legal expenses enumerated in s. 20.455 (1) (d). Upon receipt of such statement, the respective department head shall audit the same and upon finding it to be correct shall certify the amount thereof to the department of administration to be paid into the general fund out of the proper appropriation.

(5) PREPARE FORMS. Whenever requested by the head of any department of the state government, the department of justice shall prepare proper drafts of forms for contracts and other writings which may be wanted for the use of the state.

(6) ATTORNEY FOR STATE EMPLOYES. At the request of the head of any department of state government, the attorney general may appear for and defend any state officer or employe of the department in any civil action or civil proceeding brought against the officer or employe for or on account of any act growing out of or committed in the lawful course of the officer's or employe's duties. Witness fees or other expenses determined by the attorney general to be reasonable and necessary to the defense in the action or proceeding shall be paid as provided for in s.

885.07. The attorney general may compromise and settle the action as the attorney general determines to be in the best interest of the state. Members, officers and employes of the Wisconsin state agencies building corporation, the Wisconsin state public building corporation and agents of any department shall be covered by this section while acting within the scope of any written agreement entered into prior to the occurrence of any act which results in a civil action or civil proceeding.

(7) KEEP RECORD OF ACTIONS. The department shall keep a record of all actions and demands prosecuted or defended by the department on behalf of the state and all related proceedings. The department may dispose of public records in accordance with s. 16.61.

(9) PERFORM OTHER DUTIES. The department of justice shall perform all other duties imposed upon the department by law.

Sec. 757.85, Wis. Stats.:

757.85 Investigation; prosecution. (1) The commission shall investigate any possible misconduct or disability of a judge or justice. Misconduct constitutes cause under article VII, section 11 of the constitution.

(2) The commission may issue subpoenas to compel the attendance and testimony of witnesses and to command the production of books, papers, documents or tangible things designated in the subpoena in connection with an investigation under this section.

(3) The commission may notify a judge that the commission is investigating possible misconduct by or disability of the judge. Before finding probable cause, the commission shall notify the judge of the substance of the complaint or petition and afford the judge a reasonable opportunity to respond. If the judge responds, the commission shall consider the response before it finds probable cause.

(4) The commission may require a judge who is under investigation for disability to submit to a medical examination arranged by the commission.

(5) The commission shall upon a finding of probable cause that a judge has engaged or is engaging in misconduct, file a formal complaint with the supreme court. Upon a finding of probable cause that a judge has a disability, the commission shall file a petition with the supreme court. If the commission requests a jury under s. 757.87 (1), the request shall be attached to the formal complaint or the petition.

(6) The commission shall prosecute any case of misconduct or disability in which it files a formal complaint or a petition.

(7) Insofar as practicable, the procedures applicable to civil actions apply to proceedings under ss. 757.81 to 757.99 after the filing of a complaint or petition.

MOTION FILED
FEB 6 1980

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1172

RICHARD G. HARVEY, JR.,

Petitioner,

v.

SYLVESTER HARRIS,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE VOLUNTARY ASSOCIATION OF THE TRIAL JUDGES OF WISCONSIN

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February 4, 1980

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The Voluntary Association of the Trial Judges of Wisconsin respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The nature of the interest of the Voluntary Association of the Trial Judges of Wisconsin is as

follows:

The Voluntary Association of the Trial Judges of Wisconsin, founded in 1975, is an association of trial judges of the Wisconsin judiciary, whether active, retired or of reserve status, including retired Wisconsin Supreme Court justices.

Among the purposes of the Voluntary Association of the Trial Judges of Wisconsin is to improve the efficient administration and quality of justice in the State of Wisconsin; to determine and publicly express when appropriate the view point of its members on issues affecting the judicial system; and to insure the independence of the judiciary, upon the premise that the independent, honest and effective administration of justice is the bulwark of good government and democratic society. The Association filed a brief amicus curiae in this case with the United States Court of Appeals for The Seventh Circuit.

The Association is interested in the issues of judicial immunity, and color of law, as they

have arisen in the above-captioned case. The Associa believes that its participation as amicus curiae is especially important in that the significance of this case goes beyond the interests of the party litigants, and affects the interests of all trial judges in Wisconsin. For that reason, the Association believes that the questions relating to judicial immunity and color of law may not be adequately presented by the parties, particularly as they relate to Wisconsin practice.

Respectfully submitted,

William F. Kolbe
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Voluntary Association of
The Trial Judges of
Wisconsin

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February 4, 1980

IN THE
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BRIEF AMICUS CURIAE OF THE
VOLUNTARY ASSOCIATION OF THE TRIAL
JUDGES OF WISCONSIN

Amicus Curiae, The Voluntary Association of the Trial Judges of Wisconsin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 20, 1979.

INTEREST OF AMICUS CURIAE

The nature of the interest of the Voluntary Association of the Trial Judges of Wisconsin is stated in the annexed motion for leave to file brief amicus curiae.

ARGUMENT

The Voluntary Association of the Trial Judges of Wisconsin urges this Court to grant the petition to settle important questions of vital interest to the judiciary and people of the State of Wisconsin.

The Association submits that a clear and direct resolution by this Court of the first and second questions presented by the petition is essential to the proper and independent functioning of the state judiciary.

It is the Association's position that Bradley v. Fisher, 80 U.S. 335 (1872), as recently reaffirmed in Stump v. Sparkman, 435 U.S. 349

(1978), compels an affirmative answer to the first question presented. The Association is gravely concerned with the recent sharp increase in damage suits against Wisconsin judges and believes that, unless this question is clearly and affirmatively answered by this Court, such suits will only increase, to the detriment of the interests of the public in a properly functioning judiciary.

The second question presented is of particular concern to the Association. Beyond the incongruity of the holding -- that Judge Harvey's actions were outside the pale of his judicial role, but at the same time attributable to the State -- is its practical effect. The result of the decision below not only subjects a judge to the jurisdiction of the federal courts by virtue of his judicial office, but also deprives him of any defense arising out of his official position. Further, under this holding, a judge cannot look to the state or any political subdivision to pay the judgment or

defray the costs of defense in that he is not acting within the scope of his employment. Sec. 895.46, Wis. Stats. Nor, in the Association's experience, can a judge obtain judicial liability insurance to cover such risks.

Finally, like the prosecutor in Imbler v. Pachtman, 424 U.S. 409, 429 (1976), a Wisconsin judge "is amenable to professional discipline by an association of his peers." Errant Wisconsin judges may be disciplined or removed by the Wisconsin Supreme Court. Art. VII, sec. 11, Wis. Const. In addition, they may be removed by the State Legislature by impeachment and trial in the Senate, art. VII, sec. 1, sec. 17.06, Wis. Stats., or by address of both houses. Art. VII, sec. 13, sec. 17.09(4), Wis. Stats. In the final analysis, Wisconsin judges are answerable to the people of this State who may recall them by petition, sec. 9.10, Wis. Stats., or vote against their reelection.

CONCLUSION

The Voluntary Association of the Trial Judges of Wisconsin respectfully requests that this court grant the petition to resolve questions of crucial significance to the judiciary and people of Wisconsin.

Respectfully submitted,

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Judges of Wisconsin
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Dated February 4, 1980